

TREASURING WHAT WE MEASURE AND MEASURING WHAT WE TREASURE: POST-2015 MONITORING FOR THE PROMOTION OF EQUALITY IN THE WATER, SANITATION, AND HYGIENE SECTOR

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ABSTRACT

The Millennium Development Goals (MDGs) harnessed the power of numbers to focus the world's attention on some of the most pressing development challenges. Numbers are perceived to be professional, rational, credible, and neutral. The MDGs embody both the promise and the peril of development approaches that view measurable outcomes as the most certain path to progress for all. They focus on quantifiable progress in access to basic social services and goods, using only well-known indicators, metrics, and established data sets for monitoring. Further, they focus on aggregate progress, failing—except in relation to a specific gender equality goal—to capture the dimension of equality and non-discrimination. However, recent decades have shown that overall progress often does not reach those who experience

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discrimination and marginalization in addition to poverty. The failure to address inequalities may be the most significant blind-spot of the MDGs. This article suggests that unless action is taken to deliberately address the discrimination that particular individuals and groups face, the post-2015 goals will likely fail to address the underlying truth behind the numbers: MDG indicators are consistently worse for groups facing discrimination.

This article sets out how progress must be redefined beyond aggregate outcomes and toward the achievement of substantive equality using water, sanitation, and hygiene (WASH) as a case study. The article uses a process in the WASH sector—the deliberations and outcomes of the “Working Group on Equity and Non-Discrimination” convened by the Joint Monitoring Programme of WHO and UNICEF—to demonstrate how the integration of equality can be achieved. The case study also demonstrates that the use of human rights principles to animate and fine-tune development monitoring frameworks results in a synergy between rights and development that does not displace the particularities of either. Measuring development progress will never replace human rights monitoring, since human rights progress entails a wide variety of obligations and duties that are not captured by development goals and cannot be assessed solely using development indicators, no matter how rights-sensitive they are.

The article addresses both the importance of global monitoring of inequalities in development progress and some pitfalls inherent to setting global goals and measuring progress (Section I), before introducing the relevant human rights framework (Section II). The article proceeds to discuss how non-discrimination and equality can be integrated into future goals, targets and indicators (Section III) and discusses concrete suggestions for monitoring in the WASH sector, including a proposal for a metric that could be used to monitor progress in eliminating inequalities (Section IV). It concludes by demonstrating the advantages of redefining development progress in a way that puts the elimination of inequalities at its core and measuring progress towards this, combined with a word of caution about only valuing what we can measure.

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INTRODUCTION

In September 2000, world leaders made an unprecedented commitment to eradicate global poverty when they adopted the

Millennium Declaration.¹ This high-level political commitment and the subsequent focus on a set of measureable, time-bound Millennium Development Goals (MDGs)² created a common framework for assessing progress by 2015.³ The MDGs placed key issues on the agenda that might have otherwise been neglected. With the MDGs as an agreed framework for action at the international and national levels, governments, development banks, international organizations, and donors have worked to deliver on what was agreed upon to measure: a limited number of focus areas for development.⁴ These areas have become priorities for national and international policy-making, budget allocations, and the targeting of development assistance. The seemingly distant international framework has in many places had a direct and concrete impact on people's lives, their health, and well-being. Looking toward the future, there is no doubt that the post-2015 development framework that will succeed the MDGs will influence fundamental decisions on policy-making, priority-setting, and budgeting in the coming decades. It is therefore essential to identify and crystalize lessons learned from the MDGs to the post-2015 framework.

The MDGs harnessed the power of numbers to focus the world's attention on some of the most pressing development challenges. Numbers are perceived to be professional, rational, credible, and neutral,⁵ and the MDGs have reinforced the turn to quantification in development policy.⁶ As a short list of goals supported by concrete targets and indicators for measuring progress, the MDGs embody both the promise

¹ See United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 11–12, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

² 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); See also U.N. Statistics Div., *Official List of MDG Indicators*, MILLENNIUM DEVELOPMENT GOAL INDICATORS (Jan. 15, 2008), <http://unstats.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm> [hereinafter UNSD, *List of MDG Indicators*].

³ U.N. System Task Team on the Post-2015 U.N. Development Agenda, Review of the Contributions of the MDG Agenda to Foster Development: Lessons for the Post-2015 U.N. Development Agenda, at 4–5 (2012), http://www.un.org/millenniumgoals/pdf/mdg_assessment_Aug.pdf.

⁴ Sakiko Fukuda-Parr & Alicia Ely Yamin, *The Power of Numbers: A Critical Review of MDG Targets for Human Development and Human Rights*, 56 DEVELOPMENT 58, 59 (2013) [hereinafter Fukuda-Parr & Yamin]. Even these few areas are defined in an incomplete manner, leaving important elements such as quality standards aside.

⁵ LORENZO FIORAMONTI, HOW NUMBERS RULE THE WORLD: THE USE AND ABUSE OF STATISTICS IN GLOBAL POLITICS 21, 28 (Zed Books, Ltd., 2014) [HEREINAFTER FIORAMONTI, STATISTICS IN GLOBAL POLITICS].

⁶ *Id.* at 153.

and the peril of development approaches that view measurable outcomes as the most certain path to progress for all.⁷ They focus on quantifiable improvements in access to basic social services and goods,⁸ and in doing so apply most directly to developing countries. Using only well-known indicators, metrics, and established data sets for monitoring, they omit attention to issues that are seen as difficult to measure, such as quality, accountability, and participation.⁹

In addition, the MDGs focus on overall progress of populations, as such accepting the trickle-down theory, which assumes that any progress would eventually reach the poorest and most marginalized. The MDGs seek to eradicate extreme poverty and hunger, to achieve universal primary education, to improve health and combat disease, and to improve access to water and sanitation at an aggregate level, failing to capture the dimension of equality and non-discrimination,¹⁰ except in relation to a specific gender equality goal.¹¹ If services were improved, the belief was, ultimately, the entire population would reap the benefits. However, recent decades have shown that there is no reliable trickle-down effect, and that progress often does not reach those who experience discrimination and marginalization in addition to poverty. Too often, the most marginalized individuals and groups in society continue to be excluded from progress. The failure to address inequalities may be the most significant blind spot of the MDGs. This article suggests that unless deliberate action is taken to address the discrimination that particular individuals and groups face, the post-2015 goals will likely fail to address the underlying truth behind the numbers: MDG indicators are consistently worse for groups facing discrimination in every region.¹²

⁷ Fukuda-Parr & Yamin, *supra* note 4, at 58–59.

⁸ *Id.*

⁹ *Id.* at 62–63. The former U.N. High Commissioner for Human Rights, Navi Pillay remarked that “we treasured what we measured, rather than the other way around,” see Navi Pillay, Human rights and the Post-2015 Measurement Agenda, Keynote address at the Presentation of the Report of the U.N. System Task Team on the Post-2015 Development Agenda: Statistics and Indicators for the Post-2015 Development Agenda (July 4, 2013) (Geneva), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13509&LangID=E>.

¹⁰ U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS [OHCHR], CLAIMING THE MILLENNIUM DEVELOPMENT GOALS: A HUMAN RIGHTS APPROACH, at 4, U.N. SALES NO. E.08.XIV.6 (2008) [hereinafter OHCHR, CLAIMING THE MDGS].

¹¹ *Goal 3: Promote Gender Equality and Empower Women*, UNITED NATIONS, <http://www.un.org/millenniumgoals/gender.shtml> (last visited Sept. 21, 2014) [hereinafter *Goal 3*]; see also United Nations Millennium Declaration, *supra* note 1, ¶ 20.

¹² CLAIRE MELAMED, PUTTING INEQUALITY IN THE POST-2015 PICTURE 3–4 (Overseas Dev. Inst. 2012), available at www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7599.pdf [hereinafter MELAMED, INEQUALITY IN THE POST-2015 PICTURE].

The formulation of the post-2015 development agenda and its monitoring framework presents an unprecedented opportunity to redefine our understanding of progress by integrating human rights. The new agenda cannot advance without placing equality and non-discrimination at its core, and it must be relevant to rich and poor countries alike. The framework should deliberately aim at reducing gaps between the “haves” and “have-nots” while focusing on those experiencing discrimination across countries and societies. The choice of goals, targets, and indicators must be filtered through human rights law, which entails legally binding obligations for all states and describes the enabling conditions for human capabilities.¹³

Human rights law demands this redefinition of progress and provides conceptual tools for doing so. While there was much less clarity on the precise contours and content of some human rights at the time the Millennium Declaration was adopted, economic, social, and cultural rights have since been clearly articulated, and significant progress has been made on monitoring the implementation of human rights principles such as accountability and participation.¹⁴ In particular, human rights bodies have emphasized the role of non-discrimination and equality in the realization of all rights.¹⁵ Most importantly, substantive equality extends to situations in which facially neutral policies or measures—such as development policies adopted in the context of the MDGs—have the practical effect of disadvantaging certain population groups. In such situations, human rights law requires states to dismantle discriminatory practices and to take positive steps to reverse the impact of such discrimination.¹⁶ This is the case in relation to the rights undergirding the

¹³ See Martha Nussbaum, *Capabilities, Entitlements, Rights: Supplementation and Critique*, 12 J. HUMAN DEV. & CAPABILITIES 23, 24 (2011) [hereinafter Nussbaum] (describing the connections between human rights and the capabilities approach).

¹⁴ See, e.g., U.N. Comm. on Economic, Social and Cultural Rights [CESCR], *CESCR General Comment No. 13: The Right to Education (Art. 13)*, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999); Office of the High Commissioner for Human Rights & Center for Economic and Social Rights, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda*, HR/PUB/13/1 (2013); Center for Economic and Social Rights, *The Opera Framework: Assessing Compliance with the Obligation to Fulfill Economic, Social and Cultural Rights*, 1 *passim* (2012).

¹⁵ U.N. Comm. on Economic, Social and Cultural Rights [CESCR], *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para 2. of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 29, U.N. Doc. E/C.12/GC/20 (2009) [hereinafter CESCR, GC 20].

¹⁶ See SANDRA FREDMAN, *DISCRIMINATION LAW* 26 (2d ed. 2011) [hereinafter FREDMAN].

MDGs, such as the human rights to food, housing, health, water, and sanitation.

Indeed, the human rights to water and sanitation serve as an illustration of the importance of integrating the elimination of inequalities into the development agenda, and efforts within the water, sanitation, and hygiene (WASH) sector demonstrate the immense potential for redefining progress using these human rights norms. While the rights to water and sanitation have been implicit in the human rights framework since its inception, the UN General Assembly and the Human Rights Council recognized them explicitly only in recent years.¹⁷ This recognition at the political level has created enormous momentum in the WASH sector, galvanizing international and national commitment to build capacities and scale up efforts to provide adequate water and sanitation for all. Most importantly for this article, this political momentum has resulted in an enthusiasm for integrating human rights into the post-2015 development framework—especially the guarantee of equality and non-discrimination.¹⁸

This article sets out how progress must be redefined beyond aggregate outcomes and toward the achievement of substantive equality in human development, using access to water and sanitation as a case study. Specifically, the article examines how this understanding of progress can be integrated in the future development agenda, including through the construction of goals, targets, and indicators, as well as methods for measuring and monitoring progress. The article uses a process in the WASH sector—the deliberations and outcomes of the Working Group on Equity and Non-Discrimination, convened by the Joint Monitoring Programme of WHO and UNICEF—as a case study to demonstrate how the integration of equality can be achieved. It uses a retrospective approach, deliberately not covering all other processes and debates about addressing (in)equalities in the post-2015 agenda, which are ongoing at the time of writing. Beyond the WASH sector as such, the utility of this case study lies in its potential to translate this methodology

¹⁷ The Human Right to Water and Sanitation, G.A. Res. 64/292, U.N. Doc. A/RES/64/292, *passim* (Aug. 3, 2010) [hereinafter G.A. Res. 64/292]; Human Rights Council Res. 15/9, Human Rights and Access to Safe Drinking Water and Sanitation, 15th Sess., Oct. 6, 2010, U.N. Doc. A/HRC/RES/15/9, ¶ 3 (Oct. 6, 2010) [hereinafter H.R.C. Res. 15/9].

¹⁸ WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation (JMP), Berlin, May 3–5, 2011, *Executive Summary of the Report of the First Consultation on Post-2015 Monitoring of Drinking-Water and Sanitation*, at 3 (2011), available at http://www.who.int/water_sanitation_health/publications/2011/berlin_meeting.pdf [hereinafter JMP, *First Consultation*].

to other policy fields and to demonstrate what is possible – both technically and politically.

The case study also demonstrates that the use of human rights principles to animate and fine-tune development monitoring frameworks results in a synergy between rights and development that does not displace the particularities of either. Measuring development progress will never replace human rights monitoring, since human rights progress entails a wide variety of obligations and duties that are not captured by development goals and cannot be assessed solely using development indicators, no matter how rights-sensitive they are. Indeed, measurement can never replace the qualitative and judgment-laden processes of assessment required for human rights monitoring.¹⁹

For this reason, this article should not be read as an argument for transforming development frameworks into human rights monitoring tools, but as a way of introducing fundamental values that human rights reflect into these frameworks. This comes in acknowledgement of the trend to use quantification to confer value to certain issues, while also cautioning against the unintended consequences of this trend. Valuing what we can measure in quantitative terms should be complemented with contextualized and qualitative analysis based on values embodied in the human rights framework. More traditional human rights monitoring with its focus on the individual must retain its separate role.

Following this introduction, the article addresses the importance of global monitoring of inequalities in development progress and some of the pitfalls inherent in setting global goals and measuring progress

¹⁹ See AnnJanette Rosga & Margaret Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT'L L. 253, 258 (2009) [hereinafter Rosga & Satterthwaite]; Debra J. Liebowitz & Susanne Zwingel, *Gender Equality Oversimplified: Using CEDAW to Counter the Measurement Obsession*, 16 INT'L STUD. Q. 362, 363 (2014). It should be noted that at the normative level, there is a danger in associating numbers too closely with norms: a focus on quantitative assessments may lead to a reductionist understanding of development areas and associated human rights. There is a risk that indicators, which are narrowly constructed for the sake of measurement, will reshape the parent norm, or take on more importance than the norm. AnnJanette Rosga and Margaret Satterthwaite, *Measuring Human Rights: U.N. Indicators in Critical Perspective*, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH CLASSIFICATION AND RANKINGS 297, 305 (Davis, Kingsbury, and Merry, eds., 2012). This can have the impact of watering down the interpretation of human rights law. For this reason, it is important to distinguish rights-sensitive measurement of development outcomes from monitoring of state actions under human rights law. See Benjamin Mason Meier et al., *Examining the Practice of Developing Human Rights Indicators to Facilitate Accountability for the Human Right to Water and Sanitation*, 61 J. Hum. Rts. Prac. 159, *passim* (March 2014) (advancing the need for—and describing a process to achieve—the development of indicators for several human rights, including water and sanitation).

(Section I), before introducing the relevant human rights framework (Section II). The article proceeds to discuss how non-discrimination and equality can be integrated into future goals, targets, and indicators (Section III), and discusses concrete suggestions for monitoring in the WASH sector, including a proposal for a metric that could be used to monitor progress in eliminating inequalities (Section IV). It concludes by demonstrating the advantages of redefining development progress in a way that puts the elimination of inequalities at its core and measuring progress toward this, combined with a word of caution about only treasuring what we can measure.

I. THE PROMISE AND PERILS OF MEASURING PROGRESS

A. GLOBAL GOAL-SETTING AND MONITORING OF DEVELOPMENT AS INCENTIVE—AND DISINCENTIVE

Global monitoring of development progress helps the international community determine whether internationally agreed upon goals are being achieved. It focuses on identifying broad trends and recurrent themes across the world, elevating certain issues onto the international agenda, and providing a platform for advocacy. Global monitoring depends on comparability, since global trends are identifiable only when data are commensurable. Such comparability is also seen as creating productive competition, incentivizing states to make the same or better progress than neighboring countries or states in an economically similar position.

Although the MDGs were never intended to be national goals, they have often been used as such, having an undeniable impact on national policy-making and monitoring.²⁰ Issues that do not receive attention at the global level are also frequently disregarded in national

²⁰ FIORAMONTI, STATISTICS IN GLOBAL POLITICS, *supra* note 5, at 153. Monitoring at national and global levels has distinct purposes, which are ideally complementary. See Sakiko Fukuda-Parr & Joshua Greenstein, Accountability and MDGs: Methodology for Measuring Government Performance for Global Goals at 10, 21 (UNICEF, Soc. & Econ. Working Paper, 2011), available at http://www.unicef.org/socialpolicy/files/Accountability_and_MDGs; Jan Vandemoortele, *The MDG Story: Intention Denied*, 42 DEV. & CHANGE 1 (2011) [hereinafter Vandemoortele, *Intention Denied*].

policy-making, especially in developing countries, which often depend on international aid for programs aimed at meeting such goals.²¹

Moreover, the need to measure and report at regular intervals on the indicators used to assess progress toward the MDGs has asserted significant pressure on already overburdened and under-resourced national statistical offices.²² While the need for statistical capacity building in developing countries is recognized,²³ and some countries have managed to obtain donor funding and assistance to improve data collection for the MDG indicators, this has not always been the case, and often the aid has been inadequate.²⁴ Further, when assistance is aimed at improving capacity related to indicators used for international monitoring, national and local monitoring efforts may suffer in comparison. Indeed, some researchers have found that MDG-targeted assistance has had negative impacts on other data collection efforts.²⁵ In particular, non-quantitative assessments of progress have often been effectively sidelined in the quest for MDG data.

Given the intense focus on producing the necessary data for the MDG indicators and showing progress toward meeting the MDGs, it would be unsurprising if states have little incentive to measure what is *not* in the goals and to put in place policies and programs to make progress on other areas of development. The downside of delivering on what is measured is that there are fewer incentives to go beyond what is required and to work on the areas that are not monitored at the global level.²⁶

As mentioned in the introduction, the failure of the MDGs to address inequalities has been a significant weakness. Many targets focus

²¹ See, e.g., Fukuda-Parr & Yamin, *supra* note 4, at 59 (noting that issues relating to hunger, food, agriculture and nutrition “continue[] to be marginalized from national and international agendas” regardless of the MDG hunger target).

²² See MORTEN JERVEN, POOR NUMBERS: HOW WE ARE MISLED BY AFRICAN DEVELOPMENT STATISTICS AND WHAT TO DO ABOUT IT 94–96 (Cornell Univ. Press, 2013) [hereinafter JERVEN, POOR NUMBERS].

²³ U.N. General Assembly, Keeping the Promise: United to Achieve the Millennium Development Goals, ¶ 68, U.N. Doc. A/RES/65/1 (2010), available at www.un.org/en/ga/65/resolutions.shtml [hereinafter GA Resolution 65/1].

²⁴ JERVEN, POOR NUMBERS, *supra* note 22, at 94–96, 104–108.

²⁵ *Id.*

²⁶ Malcolm Langford & Inga Winkler, *Muddying the Water? Assessing Target-based Approaches in Development Cooperation for Water and Sanitation*, 15 (2–3) J. HUMAN DEV. & CAPABILITIES 247 *passim* (2014) (stating that in the area of water, sanitation, and hygiene, one such gap is the lack of attention to ensuring sustainability of sanitation solutions and managing wastewater).

on achieving a certain increase or decrease in access to a specific good or service, such as “halv[ing], by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation.”²⁷ This focus on aggregate outcomes provides no particular incentive to reach marginalized groups. With a few exceptions, the MDGs are silent on discrimination, inequalities and unjustifiable disparities.²⁸ At least in theory, many of the targets can be achieved without benefitting a single person with a disability, a single person belonging to an ethnic minority, or a single person living in an informal settlement.

In her country missions, the Special Rapporteur on the Human Rights to Water and Sanitation has noted that specific groups are excluded from access to water and sanitation in ways that reflect patterns of discrimination and marginalization. These groups can be identified along ethnic and socio-economic divides.²⁹ In some countries, indigenous peoples living on reserves do not have access to water or sanitation services.³⁰ Dalits often experience discrimination in accessing water and sanitation,³¹ while Roma are disadvantaged in many European countries.³² Moreover, the Special Rapporteur’s attention has repeatedly been drawn to vast gender inequalities. For instance, women and girls are overwhelmingly tasked with collecting water and are physically and sexually threatened when they fetch water, practice open defecation or access sanitation facilities outside of their home.³³ Persons with

²⁷ UNSD, *List of MDG Indicators*, *supra* note 2, (quoting MDG 7.C).

²⁸ *But see Goal 3*, *supra* note 11.

²⁹ *See, e.g.*, Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Addendum: Mission to the United States of America*, Human Rights Council, ¶ 79, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011) (by Catarina de Albuquerque).

³⁰ *See, e.g.*, Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Addendum: Mission to Costa Rica*, Human Rights Council, ¶ 48, U.N. Doc. A/HRC/12/24/Add.1 (June 23, 2009) (by Catarina de Albuquerque) [hereinafter Independent Expert on Water and Sanitation, *Mission to Costa Rica*].

³¹ *See, e.g.*, Independent Expert on the Question of Human Rights and Extreme Poverty & Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Addendum: Mission to Bangladesh*, Human Rights Council, ¶ 25–26, U.N. Doc. A/HRC/15/55 (July 22, 2010) (by Magdalena Sepúlveda Carmona & Catarina de Albuquerque) [hereinafter Independent Experts on Extreme Poverty & Water and Sanitation, *Mission to Bangladesh*].

³² *See, e.g.*, Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Addendum: Mission to Slovenia*, Human Rights Council, ¶ 33, U.N. Doc. A/HRC/18/33/Add.2 (July 4, 2011) (by Catarina de Albuquerque).

³³ *See, e.g.*, Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Addendum: Mission to Egypt*, Human Rights Council, ¶ 22, U.N. Doc. A/HRC/15/31/Add.3 (July 5, 2010) (by Catarina de Albuquerque).

disabilities are also disproportionately represented among those who lack access to water and sanitation.³⁴

The failure to attend to inequalities in the current framework has allowed states to focus on aggregate outcomes, to the point of remaining at low levels of service, or ignoring persisting gaps among different segments of society, even when their available resources would allow—and human rights law would oblige—they to go beyond the MDG commitments. The Special Rapporteur on the Human Rights to Water and Sanitation has often been faced with incomprehension by policy-makers in countries that are “on track” regarding the water and sanitation targets or have met them, when she comments on lack of access by slum dwellers or people in rural areas.³⁵ The target may be achieved,³⁶ but access to water and sanitation as guaranteed by human rights remains unrealized for many.

In societies across the world, inequalities persist and even grow.³⁷ At the same time, there is increasing awareness of the high social cost of inequalities, particularly among youth. Inequalities hinder efforts for poverty reduction and economic growth,³⁸ negatively affecting society as a whole.³⁹ In fact, in 2012, the World Economic Forum cited inequality as one of the top global risks.⁴⁰ Remedying this blind spot of the MDGs must be central to the post-2015 agenda and its monitoring framework.

³⁴ See, e.g., Independent Experts on Extreme Poverty & Water and Sanitation, *Mission to Bangladesh*, *supra* note 31, ¶ 21.

³⁵ Independent Expert on Water and Sanitation, *Mission to Costa Rica*, *supra* note 30, ¶¶ 66–67.

³⁶ UNICEF & WHO, *Millennium Development Goal Drinking Water Target Met: Sanitation Still Lagging Far Behind*, (March 6, 2012), http://www.who.int/mediacentre/news/releases/2012/drinking_water_20120306/en/#.www.who.int/mediacentre/news/releases/2012/drinking_water_20120306/en/.

³⁷ Oxfam, *Working for the Few: Political Capture and Economic Inequality*, 178 OXFAM BRIEFING PAPER 4, 26 (2014), available at www.oxfam.org/sites/www.oxfam.org/files/bp-working-for-few-political-capture-economic-inequality-200114-en.pdf [hereinafter Oxfam, *Working for the Few*].

³⁸ *Id.* at 16.

³⁹ U.N. System Task Team on the Post-2015 U.N. Development Agenda, *Addressing Inequalities: The Heart of the Post-2015 Agenda and the Future We Want for All: Thematic Think Piece*, at 5–7 (May 2012), www.un.org/millenniumgoals/pdf/Think%20Pieces/10_inequalities.pdf [hereinafter *Addressing Inequalities*].

⁴⁰ WORLD ECONOMIC FORUM, GLOBAL RISKS REPORT 19 (7th ed., 2012).

B. MAKING EQUALITY MEASURABLE

Many discussions about future targets and indicators focus on the imperative that they be measurable.⁴¹ While it is true that one of the strengths of the MDGs is the simplicity of their quantified targets, this minimalism tends to divert attention from imperatives perceived as unquantifiable.⁴² While measurability is a relevant criterion for choice among equally valid indicators,⁴³ there is a tendency in political processes to hide behind technical arguments about measurability and quantification. Measurability is not an appropriate standard for political decisions about prioritizing or de-prioritizing certain issues. Data should “be seen as a servant, rather than a master.”⁴⁴

Moreover, sometimes the question is framed as whether relevant data sets already exist, while the decisive questions should be whether existing data can be analyzed to uncover inequalities, and if not, whether relevant data can be gathered in a reliable way and linked to valid indicators. Asking such questions will reveal that existing data could be used more widely to analyze inequalities. At the same time, the current lack of data on certain issues is not accidental. Neglect often coincides with a low political profile. For example, in many countries, people living in informal settlements do not appear in the official statistics.⁴⁵ Similarly, data about populations that experience discrimination is often lacking, despite the existence of accepted methods to ethically achieve such measurement.⁴⁶ The current lack of data should not be used as an

⁴¹ See, e.g., U.N. System Task Team on the Post-2015 U.N. Dev. Agenda, *Statistics and Indicators for the Post-2015 Development Agenda*, ¶¶ v, viii, xii, 32 (July 2013), www.un.org/en/development/desa/policy/untaskteam_undf/UNTT_MonitoringReport_WEB.pdf [hereinafter U.N. Task Team, *Statistics and Indicators*].

⁴² Fukuda-Parr & Yamin, *supra* note 4, at 62–63.

⁴³ Malcolm Langford, *The Art of the Impossible: Measurement Choices and the Post-2015 Development Agenda*, UNIVERSITY OF OSLO FACULTY OF LAW, LEGAL STUDIES: RESEARCH PAPER SERIES NO. 24, 2013, at 1, 18, 19, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208314.

⁴⁴ *Addressing Inequalities*, *supra* note 39, at 13.

⁴⁵ Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Stigma and the Realization of the Human Rights to Water and Sanitation*, ¶ 35, U.N. Doc. A/HRC/21/42 (2012) (by Catarina de Albuquerque) [hereinafter Special Rapporteur on Water and Sanitation, *Report on Stigma*]; Sally Engle Merry and Summer Wood, *Indicators and the Problem of Translation: Measuring Child Rights in Tanzania*, CURRENT ANTHROPOLOGY (forthcoming 2014).

⁴⁶ See, e.g., Costanza Hermanin & Angelina Atanasova, *Making “Big Data” Work for Equality*, OPEN SOCIETY EUROPEAN POLICY INSTITUTE (Sept. 9, 2013) <http://www.opensocietyfoundations.org/voices/making-big-data-work-equality-0> (discussing the

argument against future monitoring of inequalities. Rather, improving indicator definition and data-gathering methods can be used precisely to bring certain issues to light. In this regard, the boundaries of what is currently perceived as measurable should be expanded, and methods for engaging in rights-protective measurement should be emphasized.

The focus on comparability has further stymied efforts to focus on inequalities. While inequalities are present in every country across the globe, many manifest themselves differently across regions and within countries. Some types of discrimination can be examined using categories such as gender, age, or disability, which are relevant across most, if not all, countries, whereas others—such as ethnic, racial, or caste-related discrimination—are described using different categories from country to country. Many have seen this incommensurability as a barrier for global monitoring.

Despite these differences, however, inequalities and disparities are structural factors with direct impacts on development progress. While the specific forms may vary and the individuals who are discriminated against may belong to different ethnic groups, castes, or other groupings, the reality of marginalization, exclusion, and discrimination exists across the world. Illustrating these patterns and trends through global monitoring would convey a powerful message and would provide a tool to draw attention to the situation of the most disadvantaged and marginalized, helping ensure efforts are targeted to their benefit.⁴⁷

Further, the focus on achieving equality is relevant for every country in the world, including developed countries, which may otherwise escape scrutiny against development targets, given the relatively small proportion of people left behind.⁴⁸ Indeed, progress toward targets measured in the aggregate may not be capable of illustrating where progress is needed to reduce the number of people without access to core goods, services, and capabilities. Data collection must be aimed at illustrating those issues that are most salient to why and how some groups are left behind. A commitment to better and more

Open Society Foundations' Equality Data Initiative, which promotes the collection of specific data for groups at risk of discrimination by European states, in an effort to address inequalities).

⁴⁷ See, e.g., WORLD INEQUALITY DATABASE ON EDUCATION, <http://www.education-inequalities.org/> (offering data visualizations which highlight inequalities in education across countries as well as within countries).

⁴⁸ Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Report on the MDGs and the human rights to water and sanitation*, U.N. Doc. A/65/254, ¶ 40 (Aug. 6, 2010) (by Catarina de Albuquerque).

accurate data collection as part of the global framework is essential to identifying and monitoring progress in a way that reflects human rights.

II. THE HUMAN RIGHTS FRAMEWORK

The human rights framework can guide the post-2015 development agenda and its monitoring framework by redefining the meaning of progress and expanding the notion of development. Non-discrimination and substantive equality can be infused into the design of goals, targets, and indicators to ensure that marginalized groups are not left behind and substantive equality is pursued. The substantive norms relevant to specific areas of human development provide criteria for monitoring, thus ensuring that development is not reduced to “meeting basic needs” for some, but is instead about expanding capabilities for all.⁴⁹

A. NON-DISCRIMINATION AND SUBSTANTIVE EQUALITY

1. *Legal Foundations of Non-Discrimination*

Equality and non-discrimination are the bedrock principles of human rights law.⁵⁰ Legal obligations to end discrimination and to ensure equality are central to all of the major human rights treaties. Discrimination is defined as any distinction, exclusion or restriction which has the purpose or the effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.⁵¹ Individuals and groups protected against discrimination include those distinguished or identified

⁴⁹ Fukuda-Parr & Yamin, *supra* note 4, at 63; *see also* Nussbaum, *supra* note 13.

⁵⁰ *See* Universal Resolution of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (proclaiming in art. 1 that “human beings are born free and equal in dignity and rights,” and proclaiming in art. 2 that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind”).

⁵¹ *See, e.g.*, U.N. General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1(1) (1969), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> [hereinafter ICERD]; U.N. General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, Art. 1 (1981), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>; U.N. General Assembly, Convention on the Rights of Persons with Disabilities, Art. 2 (2008), <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx> [hereinafter CRPD]; CESCR, GC 20, *supra* note 15, ¶ 29.

on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,⁵² as well as descent and ethnicity,⁵³ and disability.⁵⁴ In addition, individuals distinguished by other statuses have been found to be protected implicitly by international human rights law. This includes individuals identifiable by gender⁵⁵ and gender identity,⁵⁶ sexual orientation,⁵⁷ age,⁵⁸ and marital and family status.⁵⁹ Further, human rights law recognizes that discrimination is often highly contextual and can change over time. International treaties include protection for individuals and groups identified on the basis of “other status,” allowing for the evolution of protections to match evolving discrimination. For example, numerous human rights bodies have recently interpreted “other status” to include health status in contexts where HIV-positive individuals face discrimination.⁶⁰ Economic and social situation has been extended to those who live in poverty or experience homelessness.⁶¹

The principle of non-discrimination prohibits the less favorable or detrimental *treatment* of one individual or group based on a prohibited

⁵² International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at Part II, Art. 4 para. 1 (Dec. 16, 1966), available at www.ohchr.org/en/professionalinterest/pages/ccpr.aspx; ICERD, *supra* note 51, art. 2; CESC, GC 20, *supra* note 15, ¶ 2.

⁵³ ICERD, *supra* note 51, at art. 1(1).

⁵⁴ CRPD, *supra* note 51, at art. 1.

⁵⁵ CESC, GC 20, *supra* note 15, ¶ 20; INTERIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW: A HANDBOOK FOR PRACTITIONERS 122–138 (2011 ed.) [hereinafter NON-DISCRIMINATION IN INTERNATIONAL LAW], available at <http://www.interights.org/handbook/index.html> (protections for gender have been interpreted as implied by the explicit protections included in treaties on the basis of sex).

⁵⁶ CESC, GC 20, *supra* note 15, ¶ 32; NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 55, at 137–138, 142 (protections for gender identity have been interpreted as implied by the explicit protections included in treaties on the basis of sex).

⁵⁷ CESC, GC 20, *supra* note 15, ¶ 32; NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 55, at 138–139 (protections for sexual orientation have been interpreted as implied by the explicit protections included in treaties on the basis of sex as well as protections for individuals with “other status” and those for private and family life).

⁵⁸ CESC, GC 20, *supra* note 15, ¶ 29; NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 55, at 203–206 (protections on the basis of age have been interpreted as being implied by the explicit protections included in treaties on the basis of protections for individuals with “other status”).

⁵⁹ CESC, GC 20, *supra* note 15, ¶ 31; NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 55, at 212–217 (stating that protections on the basis of marital or family status have been interpreted as implied by the explicit protections included in treaties on the basis of protections for individuals with “other status”).

⁶⁰ See CESC, GC 20, *supra* note 15, ¶ 33.

⁶¹ *Id.* ¶ 35.

ground, such as ethnicity, sex, or religion.⁶² It also proscribes less favorable or detrimental *impact* on one individual or group identified on the basis of a prohibited ground.⁶³ The principle is binding on all levels and entities of a state: the state must act without discrimination in all spheres and at all times, including in the context of international cooperation and assistance.⁶⁴ All rights and benefits guaranteed by a state must be extended without discrimination, even if those rights and benefits were not themselves required under human rights law.⁶⁵

2. *Achieving Substantive Equality*

Non-discrimination and equality are linked under human rights law: states must ensure that individuals and groups do not suffer discrimination, and that they can enjoy equality. Many human rights treaties explicitly pair non-discrimination clauses with guarantees of equality. For instance, article 3 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires states to take measures “to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”⁶⁶

The understanding of equality in international human rights law goes beyond guaranteeing formal equality. Formal equality would be limited to examining whether a state explicitly uses distinctions or

⁶² *Id.* ¶ 10(a).

⁶³ *Id.* ¶ 15.

⁶⁴ Maastricht University & The International Commission of Jurists, *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (Feb. 29, 2012), Principle 32 c), <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm>; Inga T. Winkler and Andrea Kämpf, *Zwischen Menschenrechtsförderung und Duldung von Menschenrechtsverletzungen? Anforderungen an die Entwicklungszusammenarbeit aus der Perspektive der extraterritorialen Staatenpflichten*, 6/2 ZEITSCHRIFT FÜR MENSCHENRECHTE 63, 80–81 (2012).

⁶⁵ Rep. of the Human Rights Comm., 37th–39th Sess., Oct. 4, 1990, U.N. GAOR 45th Sess., Supp. No. 40, A/45/40, ¶ 12 (1990) (General Comment 18) [Hereinafter Human Rights Committee, GC 18].

⁶⁶ U.N. General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, § 2, art. 3 (Sept. 3, 1989), <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article3>.

categories, such as ethnicity or gender, and their legitimacy.⁶⁷ Formal equality cannot adequately address situations of indirect discrimination, where no overt distinction is made on the basis of a protected category, but where the law or program has a disproportionately negative impact on groups covered by the non-discrimination standard.⁶⁸

Substantive equality protects against both situations, applying when a law or practice formally distinguishes between groups, impermissibly treating that group differently, and also extends to situations in which laws, policies, or actions that are neutral on paper have the practical effect of disadvantaging a group without adequate justification.⁶⁹ In such situations, human rights law requires states to dismantle the discriminatory law, policy, or practice, and to take steps to reverse the impact of such discrimination.⁷⁰

Equal does not mean “the same.” The UN Human Rights Committee has explained that, “the enjoyment of rights and freedoms on an equal footing . . . does not mean identical treatment in every instance.”⁷¹ Human rights law requires equal access to services, but this does not mean that everyone must benefit from the same technical solutions or the same type of service, such as flush toilets, for example. Substantive equality does not imply treating what is unequal equally. To the contrary, what is unequal may require different treatment in order to achieve substantive equality. States may indeed need to adopt measures to treat certain groups and individuals preferably to redress past discrimination.

Human rights law requires that effective measures be taken to end discriminatory impacts and achieve substantive equality.⁷² States are obliged to take measures to enhance equality in all places where its impacts are felt, both public and private spheres.⁷³ While human rights law does not require governments to directly provide water or to build

⁶⁷ Margaret Satterthwaite, *Beyond Nannygate: Using the Inter-American Human Rights System to Advance the Rights of Domestic Workers*, in *NEW PERSPECTIVES ON GENDER AND MIGRATION: LIVELIHOODS, RIGHTS AND ENTITLEMENTS*, 275, 291 (Nicola Piper ed., 2007).

⁶⁸ CESCR, GC 20, *supra* note 15, ¶¶ 8(b), 10(b).

⁶⁹ See Int’l Women’s Rights Action Watch-Asia/Pacific, *Equity or Equality for Women? Understanding CEDAW’s Equality Principles*, at 14 (2009), available at www.iwraw-ap.org/publications/doc/OPS14_Web.pdf.

⁷⁰ OLIVIER DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY* 596 (2010).

⁷¹ Human Rights Comm., GC 18, *supra* note 65, ¶ 8.

⁷² See CESCR, GC 20, *supra* note 15, ¶ 8(b).

⁷³ *Id.* ¶ 11.

sanitation facilities wherever they are lacking,⁷⁴ it does oblige governments to take steps to ensure that everyone can access these rights on the basis of equality.⁷⁵

i. Adopting Targeted Measures and Affirmative Action

In order to achieve substantive equality, states are obliged to prioritize groups and individuals who are excluded or discriminated against.⁷⁶ Depending on the circumstances, they may need to adopt targeted positive measures to redress existing discrimination. There are times when historical or deeply engrained discrimination will be so intractable that temporary special measures—often called “affirmative action” or “positive discrimination”—are required.⁷⁷ Where barriers exist and persist, which lead to denial of rights to individuals and groups, such measures are necessary to ensure the equal participation of all and the redistribution of power and resources to groups subordinated by discrimination.⁷⁸

ii. More than Equity

Equality as a human rights principle is more than equity. Equity is “[t]he moral imperative to dismantle unjust differences, based on principles of fairness and justice.”⁷⁹ It calls for a focus on the most disadvantaged and the poorest. Many organizations in the WASH sector, including the Water Supply and Sanitation Collaborative Council,⁸⁰

⁷⁴ INGA T. WINKLER, *THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION* 111 (2012) [hereinafter WINKLER].

⁷⁵ Human rights law also requires states to provide basic services where individuals cannot access what they need. In government-run institutions such as schools, hospitals, or places of detention, direct provision of services will usually be required.

⁷⁶ FREDMAN, *supra* note 16, at 26.

⁷⁷ Comm. on the Elimination of Discrimination against Women, General Recommendation No. 25: Art. 4, para. 1, of the Convention (Temporary Special Measures), ¶¶ 17–18 (2004), *reprinted in* COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, 285, U.N. Doc. HRI/GEN/1/Rev.7 (2004).

⁷⁸ *See id.* at ¶ 18 (explaining the purpose, aim, and context for temporary special measures to ensure women’s equality with men).

⁷⁹ CATARINA DE ALBUQUERQUE, *REALISING THE HUMAN RIGHTS TO WATER AND SANITATION: A HANDBOOK, PRINCIPLES* 19 (2014), *available at* http://www.ohchr.org/Documents/Issues/Water/Handbook/Book7_Principles.pdf.

⁸⁰ *See About us: Vision, Principles & Strategy*, WATER SUPPLY & SANITATION COLLABORATIVE COUNCIL, <http://www.wsscc.org/about-us/mission-strategy-values> (last updated Aug. 7, 2013).

WaterAid,⁸¹ the World Health Organization,⁸² and the United Nations Children's Fund,⁸³ have made equity a central part of their agenda. However, from a human rights perspective, relying solely on equity carries certain risks because it is a malleable concept whose content is uncertain and is not legally binding. While equity may denote justice, it also may dilute rights claims when considered separately from equality and non-discrimination.

Embracing the human rights principles of non-discrimination and equality, as well as the justice-oriented concept of equity, must be central to the post-2015 framework, as together they provide the necessary political foothold to prioritize a state's legal obligation to combat discrimination and eliminate inequalities. The concept of equity also underscores areas where human rights law has been traditionally less robust, particularly in relation to income and wealth disparities.

B. PROGRESSIVE REALIZATION OF THE HUMAN RIGHTS TO WATER AND SANITATION

In 2010, the United Nations General Assembly adopted a resolution on the "Human Right to Water and Sanitation," which explicitly recognized the human right to water and sanitation.⁸⁴ The Human Rights Council subsequently affirmed by consensus, "that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity."⁸⁵ These resolutions have had a significant political impact, demonstrating that states recognize the human right to water and sanitation as a distinct human right.⁸⁶

⁸¹ See *What We Do, WATER AID GLOBAL*, <http://www.wateraid.org/what%20we%20do/the%20crisis/social%20exclusion> (last visited Sept. 27, 2014). ("WaterAid has adopted equity and inclusion as a core principle, intrinsic to a rights-based approach, to ensure we address issues of marginalisation and exclusion in order to realise our vision of a world where everyone has access to safe water and sanitation").

⁸² See WORLD HEALTH ORG., *About WHO*, <http://www.who.int/about/en/> (last visited Sept. 27, 2014). ("In the 21st century, health is a shared responsibility, involving equitable access to essential care and collective defence against transnational threats").

⁸³ United Nations Children's Fund (UNICEF), *Progress for Children: Achieving the MDGs With Equity* 6 (Sept. 2010), http://www.unicef.org/publications/files/Progress_for_Children-No.9_EN_081710.pdf.

⁸⁴ G.A. Res. 64/292, *supra* note 17, ¶ 1.

⁸⁵ H.R.C. Res. 15/9, *supra* note 17, ¶ 3.

⁸⁶ WINKLER, *supra* note 74, at 78–81.

Beyond this political significance, the Human Rights Council Resolution also clarifies that the human right to water and sanitation has a solid legal basis in international human rights law. It is derived from provisions in binding human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights, in particular, being a component of the human right to an adequate standard of living.⁸⁷ Already in 2002, the Committee on Economic, Social and Cultural Rights (CESCR), the treaty body responsible for monitoring state compliance with the Covenant, adopted General Comment No. 15 on the right to water as an authoritative interpretation of the Covenant, which clarifies the content of the right to water.⁸⁸ In 2010, the CESCR issued a statement on the right to sanitation.⁸⁹

The human rights to water and sanitation require that services are available, safe, acceptable, accessible, and affordable.⁹⁰ States are required to realize the rights to water and sanitation progressively (i.e., to move toward the goal of full realization as expeditiously and effectively as possible by taking deliberate, concrete, and targeted steps),⁹¹ and using the maximum of their available resources.⁹² At the same time, the principle of progressive realization recognizes that the full realization of economic, social, and cultural rights is a long-term process that is frequently beset by technical, economic, and political constraints.⁹³ Progressive realization is not intended to provide states with an excuse

⁸⁷ H.R.C. Res. 15/9, *supra* note 17, ¶ 3.

⁸⁸ See Comm. on Economic, Social and Cultural Rights, *General Comment No. 15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter CESCR, GC 15].

⁸⁹ See Comm. on Economic, Social and Cultural Rights, *Statement on the Right to Sanitation*, U.N. Doc. E/C.12/2010/1 (Mar. 18, 2011), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=68.

⁹⁰ CESCR, GC 15, *supra* note 88, ¶ 12; Human Rights Council, Rep. of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque, ¶ 35, U.N. Doc. A/HRC/12/24 (July 1, 2009); *See also* WINKLER, *supra* note 74, 125 et seq. (discussing the normative content of right to water in detail).

⁹¹ Comm. on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (Art. 2, Para. 1 of the Covenant), ¶¶ 2, 9, U.N. Doc. E/1991/23 (December, 14 1990) [hereinafter CESCR, GC 3].

⁹² International Covenant on Economic, Social and Cultural Rights, art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Comm. on Economic, Social, and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, U.N. Doc E/C.12/2007/1 (Sept. 21, 2007).

⁹³ CATARINA DE ALBUQUERQUE, *REALISING THE HUMAN RIGHTS TO WATER AND SANITATION: A HANDBOOK*, INTRODUCTION 25 (2014), *available at* http://www.ohchr.org/Documents/Issues/Water/Handbook/Book1_intro_.pdf.

not to act; rather, it acknowledges the fact that the full realization of human rights is normally achieved incrementally.

Progressive realization relates to moving toward basic access for everyone, but it also relates to improving the level of services toward complete human rights realization.⁹⁴ The human rights to water and sanitation do not allow states to settle for minimum standards. They ultimately require that states ensure that everyone can achieve an adequate standard of living.⁹⁵ Coupled with the principle of non-discrimination and equality, human rights law requires states to prioritize universal basic access.⁹⁶ Actions by states must focus first on the unserved and underserved. This means that basic access for all must be achieved before moving to higher levels of service. This must be reflected in future goals, targets, and indicators.

III. INTEGRATING EQUALITY AND NON-DISCRIMINATION IN THE POST-2015 FRAMEWORK

A forward-looking post-2015 development agenda must tackle disparities and emphasize non-discrimination and equality as core principles.

A. THE DISCOURSE AROUND EQUALITY IN THE POST-2015 AGENDA

Many agree that the current set of MDGs has masked the inequalities that lie behind the averages,⁹⁷ requiring a new method of defining and measuring progress. Compared to the MDGs at least, the current discourse around the post-2015 development agenda shows promising signs of making equality a greater focus. States, United Nations agencies, development actors and civil society organizations have put significant emphasis on the issue.

One of the formative texts for the post-2015 discussions, the report of the High-Level Panel on the Post-2015 Development Agenda, put forward “Leave No One Behind”⁹⁸ as one of the transformative shifts

⁹⁴ *Id.*

⁹⁵ ICESCR, *supra* note 92, at art. 11.

⁹⁶ See CESCR, GC 20, *supra* note 15, ¶ 13; CESCR, GC 3, *supra* note 91, ¶ 10; WINKLER, *supra* note 74, at 114, 122, 150.

⁹⁷ OHCHR, CLAIMING THE MDGS, *supra* note 10, at 4.

⁹⁸ HIGH-LEVEL PANEL OF EMINENT PERSONS ON THE POST-2015 DEVELOPMENT AGENDA, A NEW GLOBAL PARTNERSHIP: ERADICATE POVERTY AND TRANSFORM ECONOMIES THROUGH

needed for the post-2015 framework. It acknowledged that inequalities are a huge challenge and refers to inequalities along the axes of income, gender, ethnicity, disability, geography, and age.⁹⁹ It recommended the integration of inequality as a cross-cutting issue, proposing that “targets will only be considered achieved if they are met for all relevant income and social groups.”¹⁰⁰ The report by the UN Secretary General on “A life of dignity for all: accelerating progress towards the Millennium Development Goals and advancing the United Nations development agenda beyond 2015” took up the suggestions by the High Level Panel and called for transformative actions including those aimed at tackling exclusion and inequality.¹⁰¹ Secretary-General Ban Ki-moon has highlighted the successes of the MDGs while noting that progress is unequal, which he said is “a reproach to the promise of the United Nations Charter.”¹⁰² He urged UN Member States to make tackling inequality the heart of the post-2015 development agenda.¹⁰³ Moreover, (in)equalities have been one of the major areas for consultation among UN agencies, civil society, and bilateral donors at the global level.¹⁰⁴ UN agencies including UNDP,¹⁰⁵ UNICEF,¹⁰⁶ and UN Women,¹⁰⁷ as well as

SUSTAINABLE DEVELOPMENT, at 7 (2013), available at www.post2015hip.org/wp-content/uploads/2013/05/UN-Report.pdf [hereinafter HIGH-LEVEL PANEL, A NEW GLOBAL PARTNERSHIP].

⁹⁹ *Id.* at 16.

¹⁰⁰ *Id.* at 17.

¹⁰¹ U.N. Secretary-General, *A Life of Dignity for All: Accelerating Progress Towards the Millennium Development Goals and Advancing the United Nations Development Agenda Beyond 2015: Rep of the Secretary-General*, ¶ 84, U.N. Doc. A/68/202 (July 26, 2013).

¹⁰² U.N. Secretary-General, Remarks at Informal General Assembly Thematic Debate on Equality (July 8, 2013), available at <http://www.un.org/sg/statements/index.asp?nid=6955>.

¹⁰³ *Id.*

¹⁰⁴ *Addressing Inequalities, WORLD WE WANT 2015*, <http://www.worldwewant2015.org/inequalities> (last visited Sept. 28, 2014).

¹⁰⁵ UNITED NATIONS DEV. PROGRAM (UNDP), HUMANITY DIVIDED: CONFRONTING INEQUALITY IN DEVELOPING COUNTRIES 206 (2013), available at www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Humanity%20Divided/HumanityDivided_Full-Report.pdf.

¹⁰⁶ UNITED NATIONS CHILDREN FUND (UNICEF), KEY MESSAGES ON THE POST-2015 DEVELOPMENT AGENDA, 7–8 (2013), available at www.unicef.org/post2015/files/Post_2015_Key_Messages_V07.pdf.

¹⁰⁷ *Gender Justice and the Millennium Development Goals*, U.N. WOMEN, PROGRESS OF THE WORLD’S WOMEN (last updated 2011), <http://progress.unwomen.org/gender-justice-and-the-millennium-development-goals/>; see also U.N. WOMEN, A TRANSFORMATIVE STAND-ALONE GOAL ON ACHIEVING GENDER EQUALITY, WOMEN’S RIGHTS AND WOMEN’S EMPOWERMENT: IMPERATIVES AND KEY COMPONENTS (2013) [hereinafter U.N. WOMEN, STAND-ALONE GOAL ON GENDER EQUALITY], available at www.unwomen.org/10/digital-library/publications/2013/7/post-2015-long-paper.

other international organizations such as the IMF,¹⁰⁸ and the OECD,¹⁰⁹ in addition to civil society organizations like Oxfam¹¹⁰ and leading think tanks like the Overseas Development Institute,¹¹¹ have identified the reduction of inequalities as a key priority for the post-2015 framework.

For equality to actually become a key feature of the future development agenda and its monitoring framework, it will be crucial for this increasing attention to be reflected in future goals and targets.¹¹² It requires translating the increasing recognition of equality as a key development outcome into actionable targets at the political level.

B. LOOKING BEYOND INCOME DISPARITIES AND GENDER INEQUALITY

Two areas of inequality have featured strongly in the discussion of equality in the post-2015 agenda: income inequality¹¹³ and gender

¹⁰⁸ JONATHAN D. OSTRY, ANDREW BERG & CHARALAMBOS G. TSANGARIDES, REDISTRIBUTION, INEQUALITY AND GROWTH 4, 17 (International Monetary Fund 2014), available at www.imf.org/external/pubs/ft/sdn/2014/sdn1402.pdf [hereinafter OSTRY ET AL., REDISTRIBUTION, INEQUALITY AND GROWTH].

¹⁰⁹ OECD Post-2015 Reflections Element 3, Paper 1: Gender Equality and Women's Rights in the Post-2015 Agenda: A Foundation for Sustainable Development, ORG. FOR ECON. CO-OPERATION AND DEV. 3, <http://www.oecd.org/dac/POST-2015%20Gender.pdf> [hereinafter Gender Equality].

¹¹⁰ Oxfam, *Working for the Few*, supra note 37, at 4, 27.

¹¹¹ CLAIRE MELAMED, INEQUALITY IN POST-2015: FOCUS ON THE TARGETS, NOT THE GOALS? (Overseas Development Institute (ODI), 2014) [hereinafter MELAMED, FOCUS ON THE TARGETS], available at www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8808.pdf; KEVIN WATKINS, LEAVING NO-ONE BEHIND: AN EQUITY AGENDA FOR THE POST-2015 GOALS 1-2 (ODI, 2013) [hereinafter WATKINS, LEAVING NO-ONE BEHIND], available at www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8638.pdf.

¹¹² This will depend on the inter-governmental process through which the agenda is debated. See *Introduction to the Proposal of The Open Working Group for Sustainable Development Goals*, U.N. DEP'T OF ECON. & SOC. AFFAIRS, DIV. OF SUSTAINABLE DEV. 9, 13 (July 18, 2014), http://sustainabledevelopment.un.org/content/documents/4518SDGs_FINAL_Proposal%20of%20OWG_19%20July%20at%201320hrsver3.pdf [hereinafter OWG, FOCUS AREAS] (although the negotiations of the Open Working Group on Sustainable Development Goals (OWG) were initially characterized by ambivalence as to the importance of equality, the Outcome Document issued in July 2014 includes proposed goals to reduce inequalities. Proposed Goal 10 is "Reduce inequality within and among countries," and Proposed Goal 5 is "Achieve gender equality and empower all women and girls").

¹¹³ See Ostry et al., supra note 108, at 17; Oxfam, *Working for the Few*, supra note 37, at 4, 27; See Alex Cobham & Andy Sumner, *Putting the Gini back in the Bottle: 'The Palma' as a Policy-Relevant Measure of Inequality* (King's Int'l Dev. Inst., Working Paper Mar. 15, 2013) [hereinafter Cobham & Sumner], available at <http://www.kcl.ac.uk/aboutkings/worldwide/initiatives/global/intdev/people/Sumner/Cobham-Sumner-15March2013.pdf>; see also WATKINS, LEAVING NO-ONE BEHIND, supra note 111, at 3-5 (arguing against the focus on income inequalities); HIGH-LEVEL PANEL, A NEW GLOBAL PARTNERSHIP, supra note 98, at 16.

inequality.¹¹⁴ Without downplaying these factors, it should be recognized that systematic disadvantage also expresses itself along the lines of ethnicity, language, religion, caste, geographic location, social and economic status, sexual orientation, gender identity, age, disability, nationality, and other factors. A human rights-based approach would suggest that the post-2015 framework should examine forms of discrimination outlawed by human rights treaties. Further, it must not be forgotten that the world's poorest are not randomly distributed—they disproportionately share one or several of the characteristics that commonly are the basis for exclusion and discrimination.¹¹⁵ Future targets should therefore reflect the reality that poverty is often the result of multiple, intersecting forms of discrimination based on gender, disability, caste, ethnicity, or other grounds.

Focusing on wealth and income disparities does not fully address the root causes of exclusion and lack of access to social development, including water and sanitation. Examining these other factors helps explain why people lack access and can help policy-makers formulate appropriate responses. A person with a disability and a person belonging to an ethnic minority might be both poor and lacking access to water and/or sanitation, but the reasons for their lack of access will differ, and the necessary policy response to guarantee them access will therefore need to be distinct. Sometimes, the barrier preventing access is not a lack of financial resources, but rather the existence of laws, policies or cumbersome administrative procedures that lead to exclusion. For instance, slum dwellers are often excluded from formal service provision not because they are poor, but because they lack security of tenure.¹¹⁶ Moreover, without targeting the most marginalized among the poor with adequate measures, they will continue to be excluded even when efforts target the poor.

Apart from income inequalities, gender inequality has also featured very strongly in the post-2015 discussion with achieving gender equality frequently suggested as a stand-alone goal.¹¹⁷ The Millennium

¹¹⁴ See U.N. WOMEN, STAND-ALONE GOAL ON GENDER EQUALITY, *supra* note 109, *passim*; OECD, *Gender Equality*, *supra* note 109, at 1.

¹¹⁵ See, e.g., HUMAN RIGHTS WATCH, DISCRIMINATION, INEQUALITY, AND POVERTY: A HUMAN RIGHTS PERSPECTIVE 4 (2012), available at http://www.hrw.org/sites/default/files/related_material/Inequalitiespaper_3.6.13.pdf.

¹¹⁶ See, e.g., Independent Experts on Extreme Poverty & Water and Sanitation, *Mission to Bangladesh*, *supra* note 31, ¶ 71.

¹¹⁷ HIGH-LEVEL PANEL, A NEW GLOBAL PARTNERSHIP, *supra* note 98, at 17; U.N. WOMEN, STAND-ALONE GOAL ON GENDER EQUALITY, *supra* note 107; see OWG, FOCUS AREAS, *supra* note 112.

Development Goals already include a goal on gender equality. The accompanying target¹¹⁸ has been heavily criticized for limiting gender equality to education. While this is somewhat broadened through the indicators for this target, which also measure the share of women in wage employment and the proportion of seats in national parliament,¹¹⁹ the target itself remains very limited. A new goal would provide an opportunity for more comprehensive target setting and monitoring. UN Women has made forceful and elaborate proposals for a stand-alone goal on gender equality with associated targets and indicators, while also stressing the need to integrate gender equality into the goals adopted for other areas. UN Women has suggested three major elements: freedom from violence against women and girls, gender equality in the distribution of capabilities and resources, and gender equality in decision-making power.¹²⁰

C. THE WAY FORWARD

While most stakeholders agree on the importance of advancing equality, a key challenge is to reflect this commitment in goals and targets that have a concrete impact on reducing inequalities. One of the strengths of the MDGs is their format, with concrete and easy-to-communicate goals, quantitative and time-bound targets, and measureable indicators providing a clear framework for global scrutiny. Therefore, many stakeholders have argued to retain this format.¹²¹ Within this framework, it will be crucial to develop concrete goals, targets, indicators, and a comprehensive monitoring framework for reducing inequalities—beyond a narrow focus on income and gender inequalities. This may be a challenging task, but it is certainly a feasible one. In the following section, this article will present such a framework. Though developed in the context of the WASH sector, the framework could be illustrative for other sectors.

¹¹⁸ See UNSD, *List of MDG indicators*, *supra* note 2, at Target 3.A (stating, “eliminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015”).

¹¹⁹ OHCHR, *CLAIMING THE MDGs*, *supra* note 10, at 26.

¹²⁰ U.N. WOMEN, *STAND-ALONE GOAL ON GENDER EQUALITY*, *supra* note 107, at 16–18.

¹²¹ U.N. Task Team on the Post-2015 U.N. Dev. Agenda, *Realizing the Future We Want for All: Report to the Secretary-General* 8 (2012), available at http://www.un.org/millenniumgoals/pdf/Post_2015_UNTTreport.pdf.

IV. MONITORING THE ELIMINATION OF INEQUALITIES IN ACCESS TO WATER, SANITATION, AND HYGIENE

The WASH sector provides an interesting case study of how promoting equality can be integrated into the post-2015 framework. Sector professionals engaged early on in the discussions on the post-2015 process and have demonstrated an openness to integrating human rights considerations, especially the elimination of inequalities. At the very outset of a sector-wide consultation process, sector professionals agreed that, “concerns of non-discrimination and equity related to fulfilling the right to access water and sanitation should be reflected in future indicators.”¹²²

This section draws on work carried out by the authors and their colleagues in a process led by the World Health Organization’s and the United Nations Children’s Fund’s Joint Monitoring Programme for Water and Sanitation (JMP) and its Working Group on Equity and Non-Discrimination (“END Working Group”), which was chaired by the Special Rapporteur on the Human Rights to Water and Sanitation.¹²³ The article does not intend to discuss comprehensively all potential options for monitoring progress in promoting equality,¹²⁴ rather it presents the proposal developed in the context of the END Working Group in some detail. This proposal clearly shows that monitoring progress in achieving equality is feasible and that many of the challenges at the technical level can be overcome, as will be discussed below.¹²⁵

The END Working Group brought together water and sanitation sector professionals, monitoring experts and statisticians, as well as human rights experts to discuss options for addressing the elimination of

¹²² JMP, *First Consultation*, *supra* note 18, at 3.

¹²³ *See generally Equity and Non-Discrimination (END) Working Group*, WHO/UNICEF JOINT MONITORING PROGRAMME (JMP) FOR WATER SUPPLY & SANITATION, <http://www.wssinfo.org/post-2015-monitoring/working-groups/equity-and-non-discrimination/> (last visited 4 Oct. 2014).

¹²⁴ *See, e.g.*, Malcolm Langford, *Rethinking the Metrics of Progress: The Case of Water and Sanitation*, in *THE MILLENNIUM DEVELOPMENT GOALS AND HUMAN RIGHTS: PAST, PRESENT AND FUTURE* 461, 477–79 (Malcolm Langford, Andy Sumner & Alicia Ely Yamin eds., 2013) (discussing the WASH sector) [hereinafter *THE MDGS AND HUMAN RIGHTS*]; *see also generally* Dan Seymour, *Integrating Human Rights and Equality: A Development Agenda for the Future*, in *THE MDGS AND HUMAN RIGHTS* 408–25.

¹²⁵ *See* Urooj Quezon Amjad et al., *Rights-based indicators regarding non-discrimination and equity in access to water and sanitation*, 4 *J. WATER, SANITATION, AND HYGIENE FOR DEV.* 182–87 (2014) (discussing these issues outside of the END Working Group).

inequalities in the post-2015 framework.¹²⁶ The aim was to lay out proposals for equality-relevant goals, targets, and indicators that would combine three factors: meeting human rights standards, being relevant to address the main challenges in the sector, and proving to be feasible from the perspective of data collection, monitoring and statistics.¹²⁷ Once the END Working Group formulated its proposals, discussions moved forward under the auspices of the JMP to develop a consolidated proposal of goals, targets and indicators for water, sanitation, and hygiene that sought to integrate the elimination of inequalities.¹²⁸

The monitoring system that the JMP uses to measure progress toward the water and sanitation-related MDG target 7(c) relies largely on household surveys.¹²⁹ These surveys are carried out chiefly by national

¹²⁶ MARGARET SATTERTHWAITE, JMP WORKING GROUP ON EQUITY AND NON-DISCRIMINATION (END) FINAL REPORT 1-3 (2012) [hereinafter END, FINAL REPORT], available at http://www.wssinfo.org/fileadmin/user_upload/resources/JMP-END-WG-Final-Report-20120821.pdf.

¹²⁷ *Identification of targets and indicators for post-2015 global monitoring of drinking-water, sanitation and hygiene (WASH): terms of reference for Working Groups (water, sanitation, hygiene, equity and non-discrimination)*, WHO/UNICEF JOINT MONITORING PROGRAMME FOR WATER SUPPLY & SANITATION 2-3, http://www.wssinfo.org/fileadmin/user_upload/resources/Overview—Working-Groups-TOR.pdf.

¹²⁸ See WHO/UNICEF JOINT MONITORING PROGRAMME, POST-2015 WASH TARGETS AND INDICATORS, available at www.unicef.org/wash/files/4_WSSCC_JMP_Fact_Sheets_4_UK_LoRes.pdf [hereinafter JMP, WASH TARGETS AND INDICATORS]; see also ÓSCAR FLORES, ET AL., POST-2015 WASH TARGETS AND INDICATORS: A REVIEW FROM A HUMAN RIGHTS PERSPECTIVE 5-6 (2013), available at www.ongawa.org/wp-content/uploads/2013/12/WASH-Human-Rights-post-20152.pdf [hereinafter ONGAWA, 2015 WASH TARGETS AND INDICATORS] (reviewing the proposal from a human rights perspective); see U.N. WATER, A POST-2015 GLOBAL GOAL FOR WATER: SYNTHESIS OF KEY-FINDINGS AND RECOMMENDATIONS FROM U.N. WATER, at 15-16 (2014), available at www.un.org/waterforlifedecade/pdf/27_01_2014_un-water_paper_on_a_post2015_global_goal_for_water.pdf (taking up the main elements of the proposal developed by the JMP and including them in a broader proposal also covering water resources, governance, and wastewater management); see WHO/UNICEF JOINT MONITORING PROGRAMME, PROGRESS ON DRINKING WATER AND SANITATION - 2014 UPDATE (2014), available at http://www.wssinfo.org/fileadmin/user_upload/resources/JMP_report_2014_webEng.pdf [hereinafter JMP 2014 UPDATE].

¹²⁹ WHO/UNICEF, MEETING THE MDG DRINKING WATER AND SANITATION TARGET: A MID-TERM ASSESSMENT OF PROGRESS 22 (2004), available at <http://apps.who.int/iris/bitstream/10665/43021/1/9241562781.pdf> (stating that in 2000, the JMP shifted from using provider-based data from utilities, water agencies, and ministries to user-based data. Moreover, survey data from standard household surveys had only become widely available in the late 1980s and 1990s, and was seen as an enormous improvement over provider-based data, which did not capture an accurate picture of the actual use of water and sanitation facilities, as distinct to the infrastructure being built); JMP, *First Consultation*, *supra* note 18, at

statistical agencies (via surveys and censuses), as well as UNICEF (via the Multiple Indicator Cluster Survey, MICS)¹³⁰ and ICF-Macro, a USAID contractor (via the Demographic and Health Survey, DHS).¹³¹ The resulting data set includes a wide variety of equity and equality-related variables, which are amenable to much more equality analysis than has been performed to date.¹³² For example, a large proportion of DHS and MICS surveys collect data on race, national origin, language, and religion.¹³³ The JMP has started to use such data in its reporting,¹³⁴ and this could be done more systematically.¹³⁵ Other data could be generated with adaptations of the current data-collection instruments and the addition of other data sources to complement household surveys. Some potential additional sources include data from water and sanitation providers (such as data about location of users, fees paid, areas where access is nonexistent or minimal), administrative data (for example data about service levels, cut-offs and disconnections), and participatory statistics generated by residents.¹³⁶ While there are very real technical challenges associated with broadening data sources for monitoring,¹³⁷ these could be overcome with strong political will on the part of states and development partners, coupled with robust capacity-building and engagement with innovative community-based organizations with experience in collecting rights-protective statistics.

However, measurability also poses real limitations to monitoring. For instance, the situation faced by small population groups cannot always be monitored through standard surveys since over-sampling, to the degree necessary to reliably monitor inequalities, is

18 (stating that since 2002, survey and census data have made up the primary source of data used by JMP).

¹³⁰ *Multiple Indicator Cluster Survey (MICS)*, UNICEF, http://www.unicef.org/statistics/index_24302.html (last updated May 25, 2012).

¹³¹ *What We Do*, THE DHS PROGRAM, <http://www.dhsprogram.com/What-We-Do/> (last visited Sept. 21, 2014).

¹³² END, FINAL REPORT, *supra* note 126, at 10; MARGARET SATTERTHWAITE, BACKGROUND NOTE ON MDGS, NON-DISCRIMINATION AND INDICATORS IN WATER AND SANITATION 17 (n.d.), available at www.wssinfo.org/fileadmin/user_upload/resources/END-Background-Paper_1.pdf [hereinafter SATTERTHWAITE, BACKGROUND NOTE].

¹³³ *Id.* at 27.

¹³⁴ See JMP 2014 UPDATE, *supra* note 128, at 25–27.

¹³⁵ U.N. Task Team, Statistics and Indicators *supra* note 42, ¶ 92; SATTERTHWAITE, BACKGROUND NOTE, *supra* note 132, at 29.

¹³⁶ *Id.* (on administrative and provider-generated data); Jeremy Holland, *Participatory Statistics: a 'win-win' for international development, in WHO COUNTS?: THE POWER OF PARTICIPATORY STATISTICS*, 1–20 (Jeremy Holland ed., 2013).

¹³⁷ See generally U.N. Task Team, Statistics and Indicators, *supra* note 41, ¶¶ 73–132.

often not feasible. For small groups, special studies are frequently needed.¹³⁸ Other limitations stem from different factors. Certain groups that are criminalized and/or discriminated against may not wish to be identified by state authorities, given the grave risks such identification would pose. This holds true for LGBTI individuals in many countries, who may face criminal penalties and/or social and institutional hostility.¹³⁹ Decisions about whether and how to monitor the progress of groups that experience discrimination by the state, or which are subject to grave danger in society in general, should be made with the active, free, and informed consent of those populations themselves.¹⁴⁰

However, it is not necessary, advisable or possible to seek to monitor and address all types of inequalities through global monitoring in the context of the post-2015 development agenda. Integrating human rights elements into the post-2015 framework does not aim to transform it into a human rights monitoring tool, but rather to make it rights-sensitive, capturing crucial elements of the human rights framework. Indicators for human rights monitoring as such need to be designed to more closely relate to specific norms, reflecting and monitoring all elements of the rights. Thus, international and national human rights monitoring complements global development monitoring efforts and can provide much greater detail, especially in relation to how states meet their human rights obligations. Similarly, human rights monitoring at the national level can look more closely into various types of inequalities and their root causes.¹⁴¹

Decisions about which inequalities should be subject to monitoring in the post-2015 framework should be undertaken in light of

¹³⁸ END, FINAL REPORT, *supra* note 126, at 18.

¹³⁹ SATTERTHWAITE, BACKGROUND NOTE, *supra* note 132, at 33.

¹⁴⁰ Guidance could be drawn from the experience of health initiatives in reaching communities that are both vulnerable to specific diseases and subject to criminal penalties and discrimination. For example, international health initiatives have taken strong action to ensure that men who have sex with men can access prevention and treatment of HIV/AIDS—even in countries that have failed to repeal statutes criminalizing homosexual sexual activity. *See, e.g.*, UNITED NATIONS DEVELOPMENT PROGRAMME, MANDEEP DHALIWAL, ET AL, ANALYSIS OF KEY HUMAN RIGHTS PROGRAMMES IN GLOBAL FUND-SUPPORTED HIV PROGRAMMES (n.d.), available at <http://www.undp.org/content/dam/aplaws/publication/en/publications/hiv-aids/analysis-of-key-human-rights-programmes-in-global-fund-supported-hiv-programmes/Analysis%20of%20Key%20HRTS%20Programmes%20in%20GF-Supported%20HIV%20Programmes.pdf>.

¹⁴¹ *See, e.g.*, *Diagnóstico del Cumplimiento del Derecho Humano al Agua en Colombia*, DEFENSORÍA DEL PUEBLO COLOMBIA 304 (2009), http://www.defensoria.org.co/red/anexos/publicaciones/diag_agua.pdf.

the objectives, advantages, and drawbacks of global development monitoring. The remainder of this section is a reflection of the elements the END Working Group identified as most pressing based on an assessment of relevance, measurability at the global level, and significance from the perspective of human rights. The section will first outline the axes of discrimination found to be most relevant in the WASH sector and continue with a discussion of some options for capturing the elimination of inequalities and translating it into the framework of goals, targets, and indicators.

A. AXES OF INEQUALITIES RELEVANT IN THE WASH SECTOR

1. *Geographical Inequalities: Rural/Urban and Intra-Urban Disparities*

One of the most pervasive inequities in water and sanitation exists between urban and rural populations. Global monitoring shows that rural populations persistently have lower levels of access than urban populations.¹⁴² Geographically removed, remote, and marginalized regions are often overlooked in analysis of poverty and not prioritized by public institutions.¹⁴³ The disaggregation of data between rural and urban residents as practiced in the current monitoring framework¹⁴⁴ should therefore be kept in the future framework. However, another spatial dimension of inequalities—intra-urban inequalities—warrants greater attention and should be added to the future framework.

People living in urban slums or informal settlements frequently lack access to adequate water and sanitation. A study in Nairobi, Kenya, found significant inequalities between formal and informal neighborhoods related to service levels, cost of services, and consumption patterns.¹⁴⁵ Worldwide, it is estimated that a billion people

¹⁴² JMP 2014 UPDATE, *supra* note 128, at 4.

¹⁴³ See, e.g., EUROPEAN COMMISSION, POVERTY AND SOCIAL EXCLUSION IN RURAL AREAS 4 (2008).

¹⁴⁴ See UNSD, *List of MDG indicators*, *supra* note 3; END, FINAL REPORT, *supra* note 126, at 3.

¹⁴⁵ MARTIN LEDANT ET AL., ACCESS TO WATER IN NAIROBI: MAPPING THE INEQUALITIES BEYOND THE STATISTICS 15 (Global Water Operators' Partnerships Alliance & French Institute for Research in Africa, 2013) available at http://access-to-water-in-nairobi.gwopa.org/download/access_to_water_in_Nairobi_mapping_the_inequities_beyond_the_statistics.pdf.

live in slums, which is about one third of the urban population.¹⁴⁶ There are many causes for their lack of access to services, including deliberate exclusion of informal settlements from formal water and sanitation services in laws and policies.¹⁴⁷ This kind of exclusion can lead to increased inequity, as slum dwellers have little choice but to pay exceedingly high prices to informal providers for poor quality water at low or irregular levels of service.¹⁴⁸

From the perspective of human rights, the situation slum dwellers face is linked to prohibited grounds of discrimination including property, place of residence, and economic and social situation.¹⁴⁹ The CESCR has pointed out “that Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person’s land tenure status, such as living in an informal settlement.”¹⁵⁰ Economic and social situation as a prohibited ground of discrimination is closely linked to this.¹⁵¹ With regard to water, the CESCR has also emphasized that slum dwellers and homeless persons should not be denied equal rights.¹⁵²

When seeking to collect relevant data, identifying and defining slums can pose a challenge for monitoring, but significant advances have been made in recent years, including by groups working with slum-dweller organizations and through spatial analysis.¹⁵³ Assessing slums by their spatial dimensions—their location—could both yield more accurate data and serve as an effective link to planning.¹⁵⁴ In addition, the

¹⁴⁶ See WHO & U.N. HABITAT, HIDDEN CITIES: UNMASKING AND OVERCOMING HEALTH INEQUITIES IN URBAN SETTINGS (2010), available at http://whqlibdoc.who.int/publications/2010/9789241548038_eng.pdf.

¹⁴⁷ CATARINA DE ALBUQUERQUE, REALISING THE HUMAN RIGHTS TO WATER AND SANITATION: A HANDBOOK, SERVICES 26 (2014), available at http://www.ohchr.org/Documents/Issues/Water/Handbook/Book4_Services.pdf.

¹⁴⁸ See, e.g., PBS Newshour: *As Bangladesh’s Population Grows, Slum Dwellers Struggle For Clean Water Access*, (PBS television broadcast March 22, 2011), available at <http://video.pbs.org/video/1853981311/>; JMP 2014 UPDATE, *supra* note 128, at 20.

¹⁴⁹ CESCR, GC 20, *supra* note 15.

¹⁵⁰ *Id.* ¶ 25.

¹⁵¹ *Id.* ¶ 35.

¹⁵² CESCR, GC 15, *supra* note 88, ¶ 16(c).

¹⁵³ Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Participation in the realization of the human rights to water and sanitation*, ¶ 82, U.N. Doc. A/69/213 (July 31, 2014).

¹⁵⁴ MEERA MEHTA & DINESH MEHTA, CAPTURING SPATIAL ANALYSIS OF SLUMS IN GLOBAL MONITORING, available at www.wssinfo.org/fileadmin/user_upload/resources/Note-on-spatial-aspects-of-slums-April-30-2012-sent-mm_4.pdf [hereinafter MEHTA & MEHTA, SPATIAL ANALYSIS OF SLUMS].

definition of slums needs improvement;¹⁵⁵ the most feasible approach may be to use country definitions themselves.¹⁵⁶ Because household surveys usually lack sufficient sample sizes to show inequalities within cities, undertaking special slum surveys, oversampling in slum areas, and exploring the use of data gathered by slum-dweller organizations are needed to improve data on slums.¹⁵⁷ Emerging data sources and methods that include attention to equality information should be further utilized even though preliminary reviews suggest that these approaches are still at an embryonic stage.¹⁵⁸ The use of new technologies linked to mobile telephones and crowd-sourcing, for example, in relation to slums, can assist to rapidly expand data-gathering and monitoring in a participatory and transparent manner. For example, the MajiData Program established by the Kenyan Water Services Trust Fund aims at providing localized data on access to water and sanitation, especially in informal settlements. All stakeholders in Kenya can access the data, including slum dwellers who are encouraged to update the data.¹⁵⁹

2. *Inequities in Income and Wealth*

As the JMP has demonstrated in recent years, wealth inequality correlates in many countries to inequalities in access to adequate water and sanitation.¹⁶⁰ The rate of progress in access to water and sanitation is very uneven among wealth quintiles in many countries, with the poorest two quintiles frequently experiencing lack of improvement while other

¹⁵⁵ The current indicator uses a proxy looking at “households with at least one of the four characteristics: (a) lack of access to improved water supply; (b) lack of access to improved sanitation; (c) overcrowding (3 or more persons per room); and (d) dwellings made of non-durable material.” See UNSD, *List of MDG Indicators*, *supra* note 2. As this definition already relies on the lack of access to water and sanitation as one of the defining characteristics of a slum, any attempts to assess access to water and sanitation in slums might be circular. Moreover, from a human rights perspective, the lack of attention to security of tenure as a defining characteristic of slums produces a huge gap. See OHCHR, *CLAIMING THE MDGS*, *supra* note 10, at 40–41.

¹⁵⁶ MEHTA & MEHTA, *SPATIAL ANALYSIS OF SLUMS*, *supra* note 154.

¹⁵⁷ END, FINAL REPORT, *supra* note 126; See also David Satterthwaite, *A Future Urban Poor Groups Want: Addressing Inequalities and Governance Post-2015* (Int’l Inst. Env’t Dev.), May 2013, available at <http://pubs.iied.org/pdfs/17155IIED.pdf>.

¹⁵⁸ END, FINAL REPORT, *supra* note 126, at 22.

¹⁵⁹ CATARINA DE ALBUQUERQUE & VIRGINIA ROAF, *ON THE RIGHT TRACK: GOOD PRACTICES IN REALISING THE RIGHTS TO WATER AND SANITATION* 191 (2012).

¹⁶⁰ JMP 2014 UPDATE, *supra* note 128, at 22.

quintiles experience significant advances.¹⁶¹ In other countries, significant progress has been made among the lower quintiles,¹⁶² and lessons could be drawn from these experiences. Some governments are reacting to this analysis by reassessing their policies and programming to target resources on those living in poverty.¹⁶³

In presenting wealth-quintile analysis in recent years, the JMP went beyond providing the basic data required to report on the water and sanitation target and presented quantitative data that point to socio-economic segments of the population experiencing obstacles in accessing water and sanitation.¹⁶⁴ Such analyses can be very powerful in highlighting the inequities in access to water and sanitation, but also in showing that states are in a position to improve this situation with the necessary political will.

3. Group-Related Inequalities

In many countries, groups experiencing discrimination in society more broadly also face difficulties in accessing water and sanitation services. Group-related discrimination experienced by minorities relates to race, color,¹⁶⁵ language,¹⁶⁶ religion,¹⁶⁷ national origin,¹⁶⁸ birth, caste,¹⁶⁹

¹⁶¹ See, WHO/UNICEF, THE DIFFERENT FACES OF DISPARITY IN ACCESS TO WATER AND SANITATION, available at www.worldwewant2015.org/node/316840. (In India, the poorest 40–60% of the population experienced nearly no improvement in access to sanitation while access for the two richest quintiles has greatly improved).

¹⁶² See, e.g., JMP 2014 UPDATE, *supra* note 128, at 24–25.

¹⁶³ See END, FINAL REPORT, *supra* note 126.

¹⁶⁴ WHO/UNICEF, DRINKING WATER EQUITY, SAFETY AND SUSTAINABILITY: THEMATIC REPORT ON DRINKING WATER 2011, 26–27 (2011), available at http://www.wssinfo.org/fileadmin/user_upload/resources/report_wash_low.pdf; WHO/UNICEF, THE DIFFERENT FACES OF DISPARITY, *supra* note 161, at 2; JMP 2014 UPDATE, *supra* note 128, at 22–25.

¹⁶⁵ See CESCR, GC 20, *supra* note 15, ¶ 19 (“Discrimination on the basis of “race and colour,” which includes an individual’s ethnic origin, is prohibited by the [ICESCR] as well as by other treaties including the International Convention on the Elimination of Racial Discrimination”).

¹⁶⁶ CESCR, GC 20, *supra* note 15, ¶ 15.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See Committee on the Elimination of Racial Discrimination, General Recommendation No. 29, on Article 1, ¶ 1 of the Convention (2002), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=11; CESCR, GC 20, *supra* note 15, ¶ 26 (with regard to caste and descent, the CESCR has pointed out that “[t]he prohibited ground of birth also includes descent, especially on the basis of caste and analogous systems of inherited status”).

descent,¹⁷⁰ and ethnicity¹⁷¹ – all prohibited grounds of discrimination under international human rights law. The water, sanitation, and hygiene-related impacts of such discrimination are often closely related to income levels, but they are not the same. The dynamics and systems involved in discrimination against minorities and the impacts of wealth inequities are different. Monitoring can assist in elucidating these differences, helping to catalyze action in relation to the specific types of discrimination.

Recent analysis carried out by the JMP demonstrates that significant disparities exist in water and sanitation access among ethnic, religious, and language minorities in some countries. For example, in Nepal, data shows that while open defecation rates for the majority Hindu population was 37%, the rate for the minority Muslim population was 70%.¹⁷² In Laos, data show that sanitation coverage among linguistic minorities (30% coverage for Chinese-Tibetan and Mon-Khmer) is less than half that of the majority of the population speaking Lao-Tai (74% coverage).¹⁷³ A rights-sensitive analysis uncovers such patterns so that factors leading to these disparities can be explored and policy responses developed. If the progress of groups that experience discrimination and marginalization is not specifically monitored, those groups will remain excluded—even among the poorest.

Targets and indicators should therefore specifically address the “most disadvantaged groups.” As discrimination manifests itself differently across regions and in countries and because groups experiencing discrimination vary by country, the formulation “most disadvantaged groups” allows for flexibility and national specificity while making global monitoring possible. States would be required to identify the specific groups that will be monitored at the global level through a participatory national process.¹⁷⁴ This process must be inclusive and ensure active, free, and meaningful participation of all relevant

¹⁷⁰ *Id.*; see also CESCR, GC 20, *supra* note 15, ¶ 26 (states’ parties should take steps, for instance, “to prevent, prohibit, and eliminate discriminatory practices directed against members of descent-based communities and act against the dissemination of ideas of superiority and inferiority on the basis of descent”).

¹⁷¹ CESCR, GC 20, *supra* note 15, ¶ 15.

¹⁷² END, FINAL REPORT, *supra* note 126, at 7.

¹⁷³ JMP 2014 UPDATE, *supra* note 128, at 25.

¹⁷⁴ JMP, WASH Targets and Indicators, *supra* note 128, at 3. Lessons could be drawn from dialogic and participatory indicator-selection processes carried out by some NGOs, international organizations, and litigants. See Malcolm Langford & Sakiko Fukuda-Parr, *The Turn to Metrics*, 30:3 NORDIC J. HUM. RTS. 222, 230–31 (2012) [hereinafter Langford & Fukuda-Parr, *Turn to Metrics*].

population groups, in particular, of disadvantaged groups. It should involve national human rights institutions, civil society and community-based organizations, human rights organizations, and academia.¹⁷⁵ Groups that might be chosen for monitoring include those defined by ethnicity, race, religion, language, or spatially defined groups, such as residents of specific geographic areas, or other nationally tailored groupings. As such, progress (or lack thereof) in progressively eliminating inequalities regarding “disadvantaged groups” will be traceable at the global level.

4. Individual-Related Inequalities

Evidence shows that women and girls, older persons, people with chronic illnesses, and persons with disabilities often face particular barriers in accessing water and sanitation, and that these barriers are experienced both within the household and when accessing community and public facilities.¹⁷⁶ Human rights law protects against discrimination on these bases.¹⁷⁷

¹⁷⁵ There is, of course, a danger that discriminated against groups will be overlooked or deliberately excluded in this process of identifying disadvantaged groups, even if the need for inclusiveness is stressed. See JMP, WASH TARGETS AND INDICATORS, *supra* note 128, at 27. However, other avenues for identifying disadvantaged groups at the national level also have certain disadvantages. For a discussion, see SATTERTHWAIT, BACKGROUND NOTE, *supra* note 132, at 24. An approach based on inclusive participation would be the most appropriate way forward from a human rights perspective. In addition, it may have the advantage of triggering a public debate and more awareness for discrimination and inequalities at the national level.

¹⁷⁶ See, e.g., MAGGIE BLACK AND BEN FAWCETT, THE LAST TABOO: OPENING THE DOOR ON THE GLOBAL SANITATION CRISIS 84 (2008) (discussing women).

¹⁷⁷ See ICESCR, *supra* note 92, art. 3 (“The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights”); Comm. on Economic, Social and Cultural Rights, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2005/4 (2005). Moreover, human rights law provides strong protections for persons with disabilities, in particular through the Convention on the Rights of Persons with Disabilities. With regard to age, the Convention on the Rights of the Child offers strong protection for children and their particular needs. The CESCR calls on States to take steps to ensure that “[c]hildren are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households or through the burden of collecting water. Provision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency.” CESCR, GC 15, *supra* note 88, ¶ 16(b). As far as older persons are concerned, human rights bodies have acknowledged age as a prohibited ground of discrimination. See CESCR, GC 20, *supra* note 15, ¶ 29. Efforts are currently underway in the U.N. system to discuss a human rights instrument on the rights of older persons. Depending on their particular situation, older persons might face challenges in accessing water and sanitation due to mobility or other restrictions.

Global monitoring has demonstrated very powerfully that women and girls shoulder the burden of collecting household water, restricting their time for other activities, including education and work. An analysis of data from twenty-five countries in sub-Saharan Africa showed that in seventy-one per cent of households without direct access, responsibility for water collection fell to women and girls.¹⁷⁸ As such, much has been learned through questions in household surveys about intra-household inequalities related to water collection.¹⁷⁹ Much less is known about such inequalities concerning sanitation and hygiene. For example, qualitative data suggest that when households share sanitation facilities, women and girls may be required by social norms concerning privacy to avoid using the facilities except during hours of darkness, when their personal safety may be at increased risk.¹⁸⁰ In other instances, it might not be socially acceptable for them to leave the house after dark, again limiting their access to sanitation facilities.¹⁸¹ Moreover, given that not all households share resources and assets equally among their members and that some may be relatively more privileged than others, commanding more income and accessing greater consumption opportunities, it is imperative to accurately disaggregate intra-household data regarding household resources and services such as water and sanitation.¹⁸² There is evidence that intra-household inequality and poverty may disproportionately affect women, persons with disabilities, children, and older persons, but systematic data has not been gathered to effectively analyze these patterns.¹⁸³

The World Health Organization estimates that over one billion people worldwide live with some kind of physical, mental, intellectual or

¹⁷⁸ WHO/UNICEF JOINT MONITORING PROGRAMME (JMP) FOR WATER SUPPLY AND SANITATION, PROGRESS ON DRINKING-WATER AND SANITATION: 2012 UPDATE 31 (2012), available at <http://www.unicef.org/media/files/JMPReport2012.pdf>.

¹⁷⁹ END, FINAL REPORT, *supra* note 126, at 9.

¹⁸⁰ *Id.* at 27.

¹⁸¹ Sharmila L. Murthy, *In India, Dying to Go: Why Access to Toilets is a Women's Rights Issue*, COGNOSCENTI (Jun. 25, 2014), <http://cognoscenti.wbur.org/2014/06/25/human-rights-gang-rape-sharmila-l-murthy> *Gender and Water, Sanitation and Hygiene (WASH)*, UNICEF, http://www.unicef.org/esaro/7310_Gender_and_WASH.html (last accessed Sept. 21, 2014).

¹⁸² Pierre-Andre Chiappori & Costas Meghir, *Intrahousehold Inequality*, COWLES FOUND. DISCUSSION PAPER 1948 (May 29, 2014), available at <http://cowles.econ.yale.edu/P/cd/d19a/d1948.pdf>.

¹⁸³ SATTERTHWAIT, BACKGROUND NOTE, *supra* note 132, at 25–26.

sensory impairment.¹⁸⁴ Persons with disabilities are disproportionately represented among those who lack access to safe drinking water and sanitation.¹⁸⁵ Where people need to collect water from sources outside of the household, these sources may be inaccessible to persons with disabilities. The same holds true for sanitation facilities that are not designed to meet the needs of persons with disabilities.¹⁸⁶

Currently, household surveys do not systematically collect information about intra-household differences in access, such as by sex, age, or disability.¹⁸⁷ However, they could be amended to capture this dimension by focusing on the actual use of water, sanitation, and hygiene facilities by all individuals within a household.¹⁸⁸ Interviewing women, children, or persons with disabilities often draws a different picture of actual use of existing facilities, as well as of the existing barriers that explain lack of use.¹⁸⁹

In addition, it would be extremely valuable to monitor how gender, age, and disability-related inequalities manifest themselves in public facilities. Information about water, sanitation, and hygiene facilities in schools and health care facilities appears to be the most

¹⁸⁴ WORLD HEALTH ORGANIZATION/WORLD BANK, WORLD REPORT ON DISABILITY 29 (2011), available at http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf?ua=1 [hereinafter WHO, WORLD REPORT ON DISABILITY].

¹⁸⁵ See, e.g., Independent Experts on Extreme Poverty & Water and Sanitation, *Mission to Bangladesh*, *supra* note 31, ¶ 21.

¹⁸⁶ For example, a case study in Ethiopia revealed that entrances to toilets are often too narrow for wheelchairs to enter. See Jane Wilbur, Water Aid, Principles and practices for the inclusion of disabled people in safe sanitation, A case study from Ethiopia 24 (2010), available at www.ircwash.org/sites/default/files/Wilbur-2010-Principles.pdf.

¹⁸⁷ See JMP 2014 UPDATE, *supra* note 128, at 28–29.

¹⁸⁸ END, FINAL REPORT, *supra* note 126. Due to these difficulties in measuring intra-household inequalities and the present limitations of household surveys, the Consolidated Proposal developed by the Joint Monitoring Programme opts for a pragmatic approach focusing on individual-related inequalities in accessing services beyond the household. For instance, it suggests monitoring whether there are separate facilities for boys and girls at schools and whether facilities are accessible to persons with disabilities. See JMP, WASH TARGETS AND INDICATORS, *supra* note 128. However, merely monitoring these aspects in public facilities does not do justice to the increasing calls for greater attention to gender equality in the future development framework making a strong case for gender-specific rather than only household-level surveys. See Challenges and Achievements in Millennium Development Goals for Water & Sanitation for Women and Girls: Expert Paper prepared by Isha Ray, at 5–6, EGM/MDG/EP.11 (2013), available at <http://www.unwomen.org/~media/Headquarters/Attachments/Sections/CSW/58/EP11-IshaRay%20pdf.pdf> [hereinafter Ray, *Expert Paper*]. Moreover, global data is now being collected on disability that could pave the way for monitoring progress and setting targets. See WHO, WORLD REPORT ON DISABILITY, *supra* note 184, at 44–45.

¹⁸⁹ END, FINAL REPORT, *supra* note 126, at 15.

widely available,¹⁹⁰ and an emphasis on improving monitoring in such settings is closely tied to the human rights obligations that states have concerning education and health. Data concerning water, sanitation, and hygiene access in workplaces should be sought and used whenever possible. Finally, water, sanitation, and hygiene data should also be gathered from prisons and other facilities where persons are deprived of their liberty, as they often suffer deprivations of water and sanitation, even resulting in inhuman or degrading treatment.¹⁹¹ Although such data is not reliably captured around the world,¹⁹² global monitoring bodies should actively seek this information, since state obligations to both provide and monitor such access are at their apex in contexts where states deprive individuals of their liberty.

One particular area where individual inequalities and the lack of attention to women's and girl's needs is starkly apparent is menstrual hygiene. Menstruation is a taboo with major impacts on the lives of women and girls. Women and girls are often forced into furtive practices hiding the fact they menstruate and to limit their movements and social activities during menstruation.¹⁹³ Adolescent girls often face significant restrictions during and associated with their menses.¹⁹⁴ Girls may be taken out of school or workplaces or choose not to attend because there are no facilities for hygienically managing menstruation.¹⁹⁵ Because menstrual hygiene has such a strong impact on gender equality, it could be used as a proxy for information about discrimination against women

¹⁹⁰ *Id.* at 20.

¹⁹¹ *Id.* at 21; Special Rapporteur on Water and Sanitation, *Report on Stigma*, *supra* note 45, ¶28.

¹⁹² END, FINAL REPORT, *supra* note 126, at 21.

¹⁹³ Inga Winkler & Virginia Roaf, *Bringing the Dirty Bloody Linen out of its Closet – Menstrual Hygiene as a Priority for Achieving Gender Equality*, 20 CARDOZO J. L. & GENDER (forthcoming 2015).

¹⁹⁴ For further discussion, see Archana Patkar, *Menstrual Hygiene Management, Preparatory Input on MHM for End Group*, available at www.wssinfo.org/fileadmin/user_upload/resources/MENSTRUAL-HYGIENE-MANAGEMENT-Paper-for-END-group-1.pdf.

¹⁹⁵ *Id.*; Fareda Banda, *Article 10*, in THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY at 268 (Marsha Freeman, Christine Chinkin & Beate Rudolf eds., 2012); ROSE GEORGE, WATER SUPPLY AND SANITATION COLLABORATIVE COUNCIL, CELEBRATING WOMANHOOD: BREAK THE SILENCE! 3 (2013), available at www.wsscc.org/sites/default/files/content-/Research_article_files/mhm_celebrating_womanhood_final_report.pdf; see also MARNI SOMMER, UTILIZING PARTICIPATORY AND QUANTITATIVE METHODS FOR EFFECTIVE MENSTRUAL-HYGIENE MANAGEMENT RELATED POLICY AND PLANNING 11–12 (2010), available at www.wsscc.org/sites/default/files/publications/marnisommer_participatoryquantativemethodsmhmpolicyplanning_2010.pdf.

and girls in sanitation and hygiene. Targets and indicators should be crafted to capture the ability of women and adolescent girls to manage menstruation hygienically and with dignity. This can be supported by amending the relevant household surveys to explicitly ask about adequate menstrual hygiene.

B. TRANSLATING THE ELIMINATION OF INEQUALITIES INTO THE FRAMEWORK OF GOALS, TARGETS, AND INDICATORS

The above considerations can be integrated into the post-2015 development agenda and its monitoring framework to reflect the concern for progressively striving toward universal access, while eliminating inequalities. It should seek to cover as many different types of inequalities as possible—especially those plainly addressed by human rights law—beyond the narrow focus on income and gender. The focus on eliminating inequalities must be explicitly reflected in goals and targets—ideally with a visible stand-alone goal on achieving equality. Such target setting and monitoring is possible, as will be demonstrated in the proposal below.

1. *Universal Goals Coupled with an Explicit Focus on Eliminating Inequalities*

In response to the concern about averages hiding inequalities, some have proposed that future targets be made universal, so that no group can be left behind.¹⁹⁶ Under this option, a given goal could not be considered achieved unless everyone is reached. The High-Level Panel on Post-2015 argues: “When everyone, irrespective of household income, gender, location, ethnicity, age, or disability, has access to health, nutrition, education, and other vital services, many of the worst effects of inequality will be over.”¹⁹⁷

However, setting universal access as the goal—as laudable and necessary as it is—does not by itself guarantee equal access and is insufficient to ensure priority for the most disadvantaged.¹⁹⁸ Universal

¹⁹⁶ See, e.g., JOHN MCARTHUR, GLOBAL AGENDA COUNCIL ON BENCHMARKING PROGRESS, GETTING TO ZERO: FINISHING THE JOB THE MILLENNIUM DEVELOPMENT GOALS STARTED 19 (2012), available at www3.weforum.org/docs/WEF_GAC_GettingZero_Report_2012.pdf.

¹⁹⁷ HIGH-LEVEL PANEL, A NEW GLOBAL PARTNERSHIP, *supra* note 98, at 16.

¹⁹⁸ MELAMED, FOCUS ON THE TARGETS, *supra* note 111, at 1; ONGAWA, 2015 WASH TARGETS AND INDICATORS, *supra* note 128, at 16.

access at a specified target date can continue to bring focus on aggregate outcomes without setting incentives to reduce inequalities through targeting or prioritizing the most disadvantaged. To the contrary, specifying that a goal be “universal” alone may result in incentives for states to continue to prioritize the relatively well off and easy-to-reach in order to demonstrate rapid progress toward the goal of universal access. Under that scenario, the most disadvantaged would often be the last to be reached.¹⁹⁹ The future goals and targets should therefore explicitly embrace equality alongside universality. While universality is about ensuring access for all, achieving substantive equality is about “leveling up,” or working toward improving the quality and levels of service of groups that lag behind as a matter of priority.

2. *A Stand-Alone Goal on Equality*

Equality is relevant to all fields of development and must be applied to all future goals and targets by providing incentives to reduce and ultimately eliminate inequalities. However, to underscore the intrinsic value of equality as an overriding objective, it should also be a stand-alone goal.²⁰⁰ Having a stand-alone goal on promoting equality is essential to bring it to light and move it to center stage in the development agenda. While some argue that integrating equality targets into all other goals provides better incentives,²⁰¹ and that a stand-alone equality goal would lead to an insular treatment of equality,²⁰² the opposite might also be true: including equality as an overarching, cross-

¹⁹⁹ *Addressing Inequalities*, *supra* note 39, at 12; LISA HORNER & GRACE KITE, SAVE THE CHILDREN, GETTING TO ZERO: HOW WE CAN BE THE GENERATION THAT ENDS POVERTY 6, 13, 33 (2013), available at https://www.savethechildren.org.uk/sites/default/files/images/Getting_to_Zero.pdf.

²⁰⁰ Committee for Development Policy, *The United Nations Development Strategy Beyond 2015*, at 18 (2012), available at www.un.org/en/development/desa/policy/cdp/cdp_publications/2012cdppolicynote.pdf; Lars Engberg-Pedersen, *Development Goals Post-2015: Reduce Inequality*, DIIS POLICY BRIEF (2013), available at <http://subweb.diis.dk/graphics/Publications/PolicyBriefs2013/PB2013-Inequality.LEP.pdf>; U.N. Research Inst. for Social Dev. (UNRISD), *Inequalities and the Post-2015 Development Agenda*, BEYOND 2015 BRIEF NO. 2, at 1, 4 (2013), available at [www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=ACFC5542FBD29F44C1257B08005902E4&parentdoctype=brief&netitpath=80256B3C005BCCF9/%28httpAuxPages%29/ACFC5542FBD29F44C1257B08005902E4/\\$file/02%20-%20Inequalities.pdf](http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=ACFC5542FBD29F44C1257B08005902E4&parentdoctype=brief&netitpath=80256B3C005BCCF9/%28httpAuxPages%29/ACFC5542FBD29F44C1257B08005902E4/$file/02%20-%20Inequalities.pdf).

²⁰¹ MELAMED, FOCUS ON THE TARGETS, *supra* note 111, at 1.

²⁰² Vandemoortele, *Intention Denied*, *supra* note 20, at 21.

cutting concern at the “goal level” could ensure that the reduction of inequalities will be addressed under all the substantive targets.

Among the ideas for a dedicated goal on equality, one of the most cited proposals is focused on reducing income inequality, for instance by using the Gini coefficient.²⁰³ A target could either relate to a specific level of income equality or it could call for a reduction in the Gini coefficient until it fell below a certain value.²⁰⁴ However, such a proposal suffers from the shortcomings described above, not capturing the range of factors beyond income that lead to inequalities. Income inequality is not always the best proxy for measuring overall inequality. Other metrics of inequality may capture existing processes of discrimination and resulting inequalities better and more in line with human rights considerations.

The challenge is to set an overarching goal on equality that does justice to its cross-cutting nature, relevance to all fields of development, and different grounds and manifestations of inequalities. To address these challenges, the future development agenda could include an overarching goal on achieving equality, accompanied by targets for different sectors for reducing inequalities. Since it might not be necessary, feasible, or advisable to relate all targets to all different axes of inequalities, the associated indicators could focus on the dominant inequalities relevant for different sectors relating to sex, disability, age, income/wealth, ethnicity, and geographic location, among other stratifiers.²⁰⁵ The overall framework would have to ensure that all different types of inequalities are captured. Optionally, if indicators with ordinal values were selected, the different sectoral indicators could be combined for a composite score that would yield an overall measure of equality.

²⁰³ A country's Gini coefficient is between 0 and 100, with 0 indicating perfect income equality and 100 indicating absolute income inequality, meaning a single person would have all the income. For an alternative measure of income inequality, see Cobham & Sumner, *supra* note 113. For an overview of different inequalities measures, see U.N. Task Team, Statistics and Indicators, *supra* note 41, ¶ 80; see also THE WORLD BANK, *Data*, <http://data.worldbank.org/indicator/SI.POV.GINI> (last visited Oct. 10, 2014).

²⁰⁴ MELAMED, INEQUALITY IN THE POST-2015 PICTURE, *supra* note 12, at 4.

²⁰⁵ *Id.* at 5.

3. *Disaggregation of Data as a Tool for Measuring*

Already in 2010, states committed to improved systems for monitoring progress toward the MDGs so as to allow for the collection of disaggregated data to capture inequalities by recognizing that, “all countries require adequate, timely, reliable and disaggregated data, including demographic data, in order to design better programmes and policies for sustainable development.”²⁰⁶ Even the current MDG framework already calls for disaggregation of data according to different stratifiers, such as sex, to the greatest extent possible.²⁰⁷

Sometimes, disaggregation is presented as a panacea to address inequalities. It certainly is an important tool and a first step.²⁰⁸ However, experience has shown that disaggregation may not be carried through when not linked to an explicit target to reduce inequalities. By itself, disaggregation does not automatically result in the reduction of inequalities. It provides a tool for the collection of more detailed data, but policy-makers need to act on the information it reveals. The call for disaggregation therefore needs to be linked to goals and targets that offer an incentive for progress in reducing inequalities and reflect an understanding of progress as achieving substantive equality. As difficult as it may be to track inequality, given certain data constraints, the real challenge lies at the political level because the way in which development, poverty, and unequal access to goods and services is measured has tremendous influence on the direction of policies, the allocation of resources, and, ultimately, the effectiveness of responses. The post-2015 framework must be explicitly designed to reveal who remains invisible, where efforts have failed, and how development continues to exclude entire population groups. Based on these findings, goals, targets, and indicators must be framed in a way to reduce inequalities and target the most disadvantaged.

²⁰⁶ See GA Resolution 65/1, *supra* note 23, ¶ 68.

²⁰⁷ See UNSD, *List of MDG Indicators*, *supra* note 2.

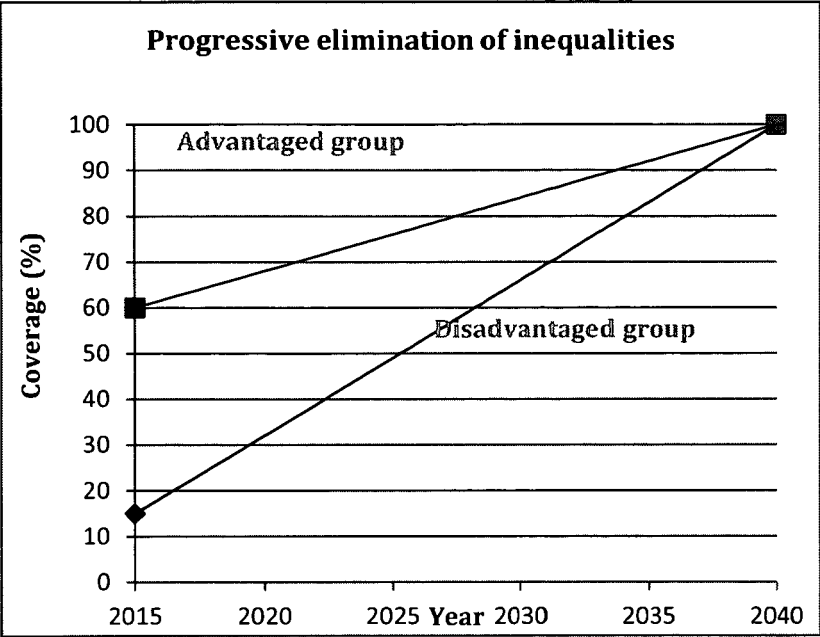
²⁰⁸ For a discussion of the importance of disaggregation when using indicators in human rights contexts, see UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS INDICATORS: A GUIDE TO MEASUREMENT AND IMPLEMENTATION 68–70 (2012).

4. *Framing Targets to Capture the Elimination of Inequalities: A Proposed Metric*

For the purposes of global monitoring, it will be necessary to develop a metric that captures the above axes of inequalities. The Special Rapporteur on the Human Rights to Water and Sanitation has developed such a metric in collaboration with others and drawing on the proposals by the END Working Group. It enables the measurement of the reduction and ultimately elimination of inequalities while reflecting progressive realization.²⁰⁹ The metric suggests that that progress in reducing—and ultimately eliminating—inequalities should be measured by comparing the more disadvantaged population group (e.g., people living in informal settlements) with the more advantaged population group (e.g., people living in formal urban areas), an exercise that can be applied to the different axes of discrimination identified above.

Building on these disaggregated data, measurement of progressively eliminating inequalities can be undertaken through the following steps: to start with, disparities between the disadvantaged group and the advantaged group can be established. Then, the necessary rate of progress for both disadvantaged and advantaged groups in order to meet each target can be determined.

²⁰⁹ Other ways of monitoring the promotion of equality and the focus on disadvantaged groups are being discussed in the WASH sector and more broadly in the context of development. One idea is to develop targets specifically focusing on disadvantaged groups, with the main drawback, however, that this would add significantly to the number of targets. Another proposal is “equity-weighting,” originally proposed by Vandemoortele and Delamonica. See Jan Vandemoortele & Enrique Delamonica, *Taking the MDGs Beyond 2015: Hasten Slowly*, IDS BULLETIN 41.1 (2012). However, such a weighing is likely to give rise debate over the specific weighing attached to progress for particular groups. For a discussion of some other proposals, see THE MDGS AND HUMAN RIGHTS, *supra* note 124.



The graph above²¹⁰ shows that faster progress will be necessary for the most disadvantaged groups. By using the starting coverage percentage and the target of universal access, the required reduction in inequalities in any given time period, for instance each year, can be calculated. If the progress of both the disadvantaged and the advantaged groups follows or even exceeds the set rate of progress, and if the disparity between the two population groups narrows accordingly, the country is considered “on-track” to meet the target. By not only focusing on narrowing the gap, but requiring progress toward universal access—combining the human rights principles of equality and progressive realization—the danger of achieving the target through regress by the more advantaged groups (“leveling down”) is avoided.²¹¹ The target can only be achieved through “leveling up.” The data from different groups can be aggregated to determine whether the country is overall “on track” to meet the target of eliminating inequalities.

²¹⁰ The authors gratefully acknowledge END Working Group members’ contributions to graphically depicting the proposed metric.

²¹¹ See U.N. Task Team, Statistics and Indicators, *supra* note 41, ¶ 90 (discussing this danger).

V. CONCLUSION

There is much to be gained by redefining progress for the post-2015 development framework, and robustly integrating the elimination of inequalities as a core commitment that inspires the entire development framework and is reflected in goals, targets, and indicators. Redefining progress in terms of achieving substantive equality and measuring progress toward that goal is possible, and global monitoring in this regard can go a long way in uncovering persisting inequalities and elevating them to the global agenda.

Current limitations in measurement or data collection should not deter the international community from committing to an equality-focused, robust set of goals, targets, and indicators. The boundaries of how data are now disaggregated, as well as what is currently perceived as measurable must be expanded to shed light on persistent inequalities. By pushing these boundaries—improving the use of existing data, expanding and adapting current data collection methods, and making use of new data sources—a lot can be achieved in monitoring equality.

The future framework should not stop at monitoring income disparities and general notions of inequity, but must seek to detect different types and manifestations of discrimination in order to examine and address the root causes of exclusion. It should target individuals and groups who benefit from non-discrimination and equality guarantees under human rights law, including those defined by ethnicity, race, religion, language, caste, and other stratifiers, or spatially identified groups such as slum dwellers, who often experience discrimination. While the specific groups may vary, patterns of marginalization, exclusion and discrimination are consistent across the world. The future framework should also address inequalities linked to a person's individual status such as gender, age, disability, or health condition. Making the promotion of equality a core component of the post-2015 development framework will help draw attention to the groups and individuals most in need and adjust development aims to better respond to the reality on the ground. Quantifying and measuring the elimination of inequalities satisfies the quest for numbers that drives much of the development agenda. It responds to the phenomenon that we “treasure what we can measure.” The mere act of measuring something confers value to it;²¹² putting numbers to an issue, being able to express it in

²¹² Ray, *Expert Paper*, *supra* note 188, at 6.

quantitative terms makes it translatable and amenable to articulation as a global concern. The downsides of such value conferred through quantification include the danger that incentives are diminished to make progress on issues that are outside of the monitoring framework.

The question is then: What is being measured? How is it chosen? And who decides on what to measure?—All too often, the “focus of the debate shifts from what is needed to what is measurable.”²¹³ At such moments, the priorities are not necessarily the most pressing concerns, but the ones that are easily quantifiable. It is much easier to measure what easily lends itself to being translated into numbers, rather than complex institutional, social, and even economic processes. It is even easier to continue measuring what has always been measured than it is to find ways to monitor new or more complex challenges.

All too often, “what we treasure” is narrowly confined to areas that easily lend themselves to consensus, whereas areas with a low political profile, areas that are relevant to people with limited agency and voice are left out. However, the human rights framework confers value. Achieving substantive equality is at the core of these values. Many forms of discrimination and inequality have been growing worse instead of better across the globe. Human rights law and the values reflected in it demand that we understand progress as reversing such trends and that we make more focused efforts to monitor the reduction of inequalities.

Yet, “the very strengths of quantification—simplification and abstraction in applying a single measurable definition across different contexts—are its Achilles heel.”²¹⁴ Even if we push the boundaries of measurement, even if we go a lot further in integrating human rights concerns into monitoring frameworks, quantitative monitoring will always have limitations and, in many cases, will rely on imperfect proxies to capture progress. Crafting measurable targets poses the danger of focusing only on certain dimensions of progress—those that were agreed upon to be valued and, hence, measured—and subsequently placing value only on what we measure. Avoiding this dilemma requires creative action to constantly challenge the notion that only quantification can bring visibility to an issue of global concern. Instead, global monitoring exercises should be complemented with contextualization using qualitative data and context-specific assessments.²¹⁵ While

²¹³ FIORAMONTI, STATISTICS IN GLOBAL POLITICS, *supra* note 5, at 170.

²¹⁴ Langford & Fukuda-Parr, *Turn to Metrics*, *supra* note 174, at 232.

²¹⁵ Rosga & Satterthwaite, *supra* note 19, at 258.

advancing efforts to measure what we treasure, we must recognize that “not everything that counts can be counted. And not everything that can be counted counts.”²¹⁶

²¹⁶ FIORAMONTI, STATISTICS IN GLOBAL POLITICS, *supra* note 5, at 144 (quote of Albert Einstein).